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COX'S
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CASES

DETERMINED IN THE

COURTS OF EQUITY,

FROM

1783 TO 1796 INCLUSIVE.

WITH

A FEW OF AN EARLIER DATE BY LORD HARDWICKE AND LORD NORTHINGTON.

VOL. I.

BY SAMUEL COMPTON COX,

ONE OF THE MASTERS OF THE COURT OF CHANCERY.

LONDON:

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PREFACE.

It will be seen that the present publication is intended only as a supplement to the existing Reports of cases determined in the Courts of Equity in the course of twelve or thirteen years, commencing in the year 1783. With this view the author has avoided, as far as he has been able, any repetition of what is already before the profession; and, in a few instances in which the cases are of a considerable length, he has inserted such parts only of his notes, in which the difference from the printed Reports appears to him to be material, sometimes giving the statement of facts only, sometimes the judgment. The cases of a date antecedent to 1783, viz. those decided by Lord Hardwicke and Lord Northington, are, in general, such as have been cited or alluded to from the Bench or the Bar in the course of the argument of the principal cases: they are stated from notes on which the author conceives he can safely rely, with the assistance of a reference to the Register's books.

After the interval of time which has elapsed since the most recent of these decisions, the author certainly should not have thought this publication of itself of sufficient importance to be offered to the profession, but he has been led to it by other considerations. Having been the editor of the 5th and 6th

editions of Peere Williams's Reports, to which he has subjoined notes of his own; and it having been represented to him that a further edition of that work was wanting, it occurred to him that the statement of *original* cases in the body of the notes in some degree interrupted the plan which he had attempted to pursue, of giving only (and in as short a manner as he was able) the *principles* established by the several decisions referred to; and that, in this view, it would be an improvement in the arrangement of the notes, if the *original* cases were withdrawn from them, and were collected in an appendix, to which he might refer, as he should have occasion, in the same manner as to other Reports. It afterwards appeared to him that he was in possession of some unreported cases, which, although not connected with Peere Williams's Reports, might occasionally be found of service. The points decided by some of them (especially perhaps those relating to bankruptcy) may now be considered as so well established, that the cases themselves may afford no new information; still, however, as they were decisions made at a time when the matters in question were treated as doubtful, they may not appear altogether devoid of interest, and they add but very little to the bulk of the work. Under these impressions, the author has been induced to enlarge in some degree his original design,

A

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ERRATA,

Vol. II. p. 235, l. 7, for *favias* read *facias*.

——— ——————— for *repeat* read *repeal*.

CASES IN CHANCERY, &c.

EARL OF INCHIQUIN *versus* FRENCH.

Hil. Term, 18 Geo. II.

THE Earl of Thomond, by his will made in 1738, first directed, that all his just debts, which he should owe at his death, should be justly paid; and then devised all his manors, lands, tenements, &c. in England and Ireland, to the use of Lord Inchiquin and Mr. French, and their heirs, upon trust, that they should, within a convenient time after his (the said testator's) decease, make one or more sale or sales of a competent part of the premises for the best price and most money that could be got for the same; and with the money arising thereby, and by the yearly rents and profits of all the said premises in the mean time, *first pay and discharge all his* (the said testator's) *debts*, and the pecuniary legacies thereby given, and such other legacies as he should thereafter give by any *codicil or codicils*; and in the *next* place, reimburse themselves all costs, charges, and expenses of the trust, and upon further trust after payment of his debts and legacies, and reimbursement of such charges and expenses, then to convey so much and such part of the said premises as should remain unsold to the use of Murrough O'Brien (commonly called Lord O'Brien) for life, without impeachment of waste, with remainder to trustees to be therein named to preserve contingent remainders, with remainder to the first and other sons of Lord O'Brien in tail male, with remainder to the defendant Percy Wyndham (with directions for him to take the name of O'Brien) for life without impeachment of waste, with remainder to

Testator devised all his real estate to trustees upon trust to sell a competent part thereof, and in *the first place*, pay and discharge all his debts and legacies; and in the *next* place, reimburse themselves the costs of the trusts, and *after such payments* settle *such parts thereof as should remain unsold* in manner therein mentioned. And he declared his meaning to be, that *the whole money to be raised by such sale should be deemed and taken to be part of his personal estate.* And he gave all the residue of his

Briggs v Penny 3 Beg. Ho. 533.

B Johnson v Ball 5 Beg. Ho. 89.

Lee v Fleetwood 8 Ves. d. 603

Lord Inchiquin v. French.

personal estate, *of what nature and kind soever*, after payment of his debts, &c. to A. The personal estate under these directions must be applied *in the first place* in or towards payment of the debts and legacies.

The testator by his will gave a legacy of 20,000*l.* to B. and by a deed-poll bearing even date with the will, declared that the said legacy was so given to B. upon the special trust and confidence, that so soon as B. should receive the same he should pay the same over to C. B. died in the lifetime of the testator. The deed-poll was not proved as a testamentary paper. This legacy did not lapse, but subsisted for the benefit of C.

trustees to preserve contingent remainders, with remainder to his first and other sons in tail male, with remainder to the right heirs of the testator. And he thereby gave a legacy of 20,000*l.* to Sir William Wyndham, and legacies of a year's wages to his servants; and he declared it to be his express will and meaning, that the *whole money to be raised by such sale or sales as aforesaid should be deemed and taken to be part of his personal estate.* And he gave and devised all the *rest and residue of his personal estate of what nature and kind soever*, and wheresoever being, after payment of his debts, funeral expenses, and legacies, unto the said Murrough Lord O'Brien. And he made the said Sir William Wyndham and Robert French executors of his said will.

The testator also executed a deed poll or instrument in writing, bearing even date with his will, under his hand and seal, and executed in the presence of *two* witnesses only; whereby, after reciting that he had by his said will given 20,000*l.* to Sir William Wyndham, he declared that such legacy was so given to the said William Wyndham upon this special trust and confidence by the said testator in him the said Sir William reposed, that he, his executors, &c. when, or so soon as he or they should receive the said 20,000*l.* or any part thereof, by virtue of the said bequest, should pay the same over unto his kinsman Charles O'Brien Esq. commonly called Lord Viscount Clare, or to such person as he should appoint to receive the same.

The testator executed two parts of the said will and deed-poll, and enclosed one part of the said deed-poll in each part of his will; and he died on the 20th of April, 1741. Sir William Wyndham, the legatee and one of the executors, died in the lifetime of the said testator, and Mr. French, the surviving executor, proved the will: but the deed-poll does not appear to have been proved as a testamentary paper.

It appeared, that at the time of making the will the testator's personal estate was of the value of about 15,000*l.* 7,000*l.* of which consisted of household goods, furniture, plate, and jewels; and that, at the time of the testator's death, it amounted to about 30,000*l.*; and that his debts were about 59,000*l.*

Lord O'Brien died about a year after the testator, being about eleven years old, and Lord Inchiquin took out letters of administration to him.

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This bill was filed by Lord Inchiquin as such administrator, praying an account of the personal estate of the said testator, and a sale of so much of the real estate as was by the said will directed to be sold, &c. And the plaintiff thereby insisted that he was entitled to all the said testator's personal estate, clear and exempt from the payment of such debts as the said testator might owe at the time of his death, or of any legacies given by his will, which debts and legacies, or such of them as were payable, ought (as the plaintiff insisted) to be paid and discharged with the money to be raised by the sale of a sufficient part of the testator's real estate, and by the rents and profits thereof in the mean time; and that the money so to be raised out of the real estate equal to and to the amount of such debts and legacies, was by the said testator intended to be added to, and *in all events and to all purposes*, deemed part of his personal estate as an addition thereto, or an increase or augmentation thereof, with a view and design to enlarge and increase the residuum of his personal estate for the benefit of his said residuary legatee; and that the plaintiff, in consequence thereof, and as administrator as aforesaid, was entitled to and ought to have the full benefit thereof accordingly. And the bill therefore prayed that the said will might be established; that the defendant French might account for the personal estate, and that all persons who had any claims on the said testator's estate as creditors or legatees, might come in and make such claims by a limited time, and that all such of them as were really due might be paid out of the real estate; and that if any of them had been already paid out of the personal estate, *which was originally, and its nature such*, that the plaintiff might have an allowance for the same out of the real estate, or the money to be raised thereon, and that a sufficient part thereof might be sold for the purposes aforesaid; and that the plaintiff might be paid and receive the *whole* of the personal estate exempt from debts and legacies, or the *residue thereof after such* addition thereto or increase thereof as aforesaid.

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The counsel for the plaintiff therefore insisted,

First, that the plaintiff was entitled to the whole personal estate exempt from debts and legacies, as contended for by the said bill.

2d. That the said legacy of 20,000*l.* to Sir William Wyndam had, by his death in the lifetime of the said testator, lapsed. And a 3d question was made, viz. Whether, in case the Court should think the said legacy of 20,000. had not lapsed, the amount could be raised out of the real estate, the trust thereof having declared by an instrument attested by *two* witnesses only.

Lord Chancellor. The counsel for the plaintiff differ somewhat in stating the principal question in this case: some have put it, that the question is whether Lord Thomond has given the residue of his personal estate, or what he calls his personal estate, to Lord O'Brien, discharged from his debts and legacies; and others have put the question to be, whether Lord Thomond has not directed so much money *in all events* to be raised as will pay and satisfy his debts and legacies, and that to be added to what was his proper personal estate, so as to become part of it, and then gives unto Lord O'Brien so much as his own proper personal estate did amount unto.

But these questions, however they differ in words, amount to one and the same thing, if you try it by figures, which is the surest way of trying it. Suppose a man leaves 1000*l.* and another sum of 500*l.* and he gives the 1000*l.* to A. and 500*l.* to B. or suppose he directs them to be added together, and thereby makes one sum 1500*l.* and directs that out of that sum A. should have 1000*l.* and B. should have the residue, it will amount to one and the same thing. Take it either way, the question will amount to this, whether the testator has given that which is strictly personal to Lord O'Brien exempt from debts and legacies. This will depend on several of the established rules of this Court, and on the particular construction of the will in question.

By law and equity, to be sure, the personal estate is the proper fund to be first applied in payment of debts; and

with regard to the ecclesiastical laws, it is the only fund for payment of legacies. *Lord Inchiquin v. French.*

If the personal estate is to be exempted from debts and legacies, it must be either by express words, or from a necessary implication shewing the plain intent of the testator; and it need not be by express words, where, without them, the intent of the testator will plainly appear. And where the personal estate is exempted from debts and legacies, it must be given in the nature of a specific bequest; and in such case another fund must be applied for the payment of the debts and legacies; every man having a right, as amongst his representatives, to subject what part of his property he pleases to the payment of his debts and legacies.

So far I mention with regard to the personalty being to be exempted, and I think there is no substantial difference how the debts are charged upon the real estate, whether charged generally, or whether with directions to sell out and out, for in every one of these cases you will find the personal estate has been given in aid; therefore it will be impossible to lay down any settled and certain difference.

With regard to the cases cited for the plaintiff, the first was *Walker and Pink*, 5 June, 1733, at the Rolls, and in July 1736 heard before Lord *Talbot* on appeal, which was thus. A. devised all goods, chattels, and personal estates, his debts and legacies being first paid, to his son, and makes four executors: he then devised to his executors his manor of B. for 99 years, that they do out of the rents and profits or by mortgage or sale, raise (*inter alia*) 4000*l.* for the portion of one of his daughters, and after payment the term to determine, "and what money shall remain more than to satisfy the 4000*l.* shall be paid to my son; and, if my daughter die before age or marriage, then the money raised to go to such persons as will be entitled to the reversion or remainder of the estate; and for the better raising of the money I appoint that my executors do take the rents and profits;" and upon this it was held, that the personal estate was not first chargeable with the sum of 4000*l.* But that is not applicable to the present case; for that was with regard to a particular sum of money, and which was no legacy at

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all, for this was particularly charged upon the real estate, and it could not have been sued for in the Spiritual Court, and if it had, a prohibition would have gone.

The next case was *Chester* and *Painter*, 2 P. W. 335. Painter, seised in fee of a real estate, and also possessed of a personal estate, by will gives a third part of all his estate whatsoever to his wife, and gave to his son and his heirs two thirds of all his real and personal estate, upon condition to pay his debts; it was held, that the widow should have the third, not liable to debts: this was not at all applicable, for the testator expressly charges two thirds of his estate with his debts and legacies.

The next case was *Bamfield* and *Windham*, *Prec. Cha.* 101, which was this. J. S. devises all his real estate to trustees in trust to raise and levy money for payment of all his just debts with interest, and charges of his trustees, and if a surplus of lands or money, that to his sisters jointly, and all his personal estate to his wife, whom he makes sole executrix. Here it was held that the wife should take the personal estate exempt from the debts. But this is not applicable, for there the *whole* estate was devised, and not a *residue*, as it is here, and that makes a very material difference.

The next case was *Wainwright* and *Benlowes*, *2 Vern.* 1718: there the testator gave a real estate to be sold for payment of his debts, and the surplus to go between his heir at law and his younger brother, and devised his household goods to go along with his house, and gave the residue of his personal estate to his sister, whom he made executrix. And the Court held, that the personal estate should not go in ease of the real. But that differs from this, for there the whole estate was to be sold out and out, and the surplus given over, but here only a competent part is to be sold; besides there he gave a specific part of his personal estate, and then the rest and residue, which therefore must be the rest and residue which he had not otherwise devised by his will, and not the residue after debts. This case is likewise reported in *Prec. in Cha.* which in general is a good book: it is put there upon another construction, as well as this, which is, that the debts, by being greater than the

residue, would swallow such residue up, and therefore it could not be the testator's intention; but I own I am not at all satisfied with that distinction, for there is not one testator in an hundred that does not give over a residue, though he has not the least prospect of any thing passing by it, but does it without any particular meaning, but generally, that he may leave nothing undisposed of. *Lord Inchiquin v. French.*

Indeed, in *Bamfield* v. *Windham*, there might be some reason for this kind of argument, because there it was not a residue, but the whole was devised.

The next case was *Barkham* and *the Governors of Bethlem Hospital*. There it was held that the widow should have the personal estate, subject to funeral expenses only, but that was determined on the express words.

The case of *Stapleton* and *Colville*,* which seems to have been much relied upon, depended on the particular penning. Mr. Colville devised lands to his wife for life, chargeable with two annuities for life, and a legacy of 1000*l.* and gave her power to raise, by sale or mortgage of any part, such a sum as would be sufficient to pay his debts; then he devised his real estate after his wife's death to his nephew, R. Lupkin, for life, remainder to his first and other sons in tail, upon condition to take the name of Colville; and in the close of the will, he gave all his goods, chattels, and personal estate, to his wife, and made her executrix; and it was held, that she should have the personal estate free from the debts of testator. In this case I observe, that judgment was delivered with a good deal of difficulty; besides it was not a residue that was given, but *all* his goods, chattels, and personal estate.

The Defendant has cited (*inter alia*) the case of *Harewood* and *Child*,† 13th August, 1734, which was this. A. devises a real estate to trustees in trust, that by sale they should raise so much as he owed at the time of his death (the copy from the register has it, "so much as will discharge all my debts which I shall owe at my death,") and then to satisfy the charges of the trust, and then that they shall stand seised of the residue and remainder unsold to the uses therein mentioned, and if any money should remain

* Ca. temp. Talbot, 202. † Ca. temp. Talbot, 204.

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after payment of his debts, then the same to go to his daughter, and then says, "I give all my personal estate, of what nature or kind soever, to my daughter," and makes her executrix. And the Court was of opinion, that the personal estate should first go in discharge of debts. Most of the circumstances in this case concur with the circumstances in ours. Consider the peculiar penning of the will in question. It begins with saying, "As to all my worldly estate, *both real and personal*, I dispose of it as follows: first, I will that all the debts which I shall owe at the time of my death be justly paid." This shews he had no design at first to make any exemption of the personal estate; then he comes to a disposition of his real estates in the manner as in the will is mentioned, and orders the rents and profits to be applied in the same manner, in order to accelerate the payment. As to the objection that he has directed *all his debts* to be paid out of the fund to be raised, that has been over-ruled by the construction of *Harewood* and *Child*, for it only means that none of his debts shall remain unsatisfied.

This is the first case that ever came before the Court, where it was contended that *residue* of personal estate should be exempted from debts, where the very express devise was after payment of debts, legacies, and funeral expenses, and I own I did not expect to see it now.

To take off the force of these words it has been contended on the behalf of the plaintiff, that this residue means only the residue of the said fund which he ordered to be raised, and which he calls his personal estate; but there is no foundation for that construction. They likewise say, he inserted that clause on purpose, because he designed to give his proper personal estate discharged of the debts; but that makes against them, for he makes the money arising by sale to be part of that fund which the law applies in discharge of debts, &c.

It was said, that the personal estate should go discharged, because he had made a fund on purpose; but the question is not, whether he made a fund on purpose, but how much of that is to be applied; whether enough to pay the debts in general, or whether only so much as would be sufficient after the personal estate had been first applied: besides, that, at best, is but a dark implication, and that will always

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be controuled by express words. It is a dangerous thing to go into any evidence with regard to the external circumstances of this case, and to shew, that the debts would be greater than the personal estate; the Courts are not to inquire into meanings of this nature; besides it would have no effect here, because it is a bequest of a residue after the debts and legacies paid.

The words of the will, and not the circumstances of the testator, are to guide Courts in their constructions; and they will not say, that because a testator devises a residue, he necessarily meant that something should pass by that residue.

I am therefore of opinion that the personal estate must be first applied in discharge of debts and legacies.

As to the other point, I am discharged from giving any opinion upon it, because as I think it is a good subsisting legacy, it will affect the personal estate equally with the rest, and then go to the real.

His Lordship declared the will of the testator well proved; that the trusts thereof ought to be performed and carried into execution: and also declared, that the said testator's personal estate, or the total value thereof, after deducting thereout his funeral expenses only, is not by his will given to the said Lord O'Brien discharged and exempted from the said testator's debts and legacies; and that the legacy of 20,000*l.* given by the said will to Sir William Wyndham, and by the said "codicil" declared to be in trust for Lord Viscount Clare, is a subsisting legacy. And his Lordship directed the personal estate to be applied in payment of the said testator's debts and legacies, &c.

Reg. lib. B. 1744, fol. 263, by the name of *O'Brien v. French.*

MOGG *against* HODGES.

In Chancery 16 *Nov.* 1750. *S. C.* 2 *Ves.* 52.

Assets not marshalled to give effect to a bequest void by the statute of mortmain.

Dorothy Churchey, by her will of the 6th April, 1748, gave to several persons therein named, 500*l.* in trust, to be by them laid out in land for the uses following, that is to say, 10*l.* a year to the vicar of Chewton, for performing di-

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vine service in the parish of F. once every Sunday; the residue of the rents of the lands so to be purchased, to a schoolmaster, for teaching children to read, &c. And after other devises to charities, she gave all her real estate whatsoever in Wincaunton and Mapperton to her executors, in trust, at the end of 5 years after her decease to sell the same and to apply the money arising from such sale, and the rents in the mean time, to the uses in the will mentioned, and she subjected her personal estate to the payment of her debts and legacies; and, after some pecuniary legacies, she declared her will that all the residue of her "personal estate arising * by sale of her real estate," should be disposed of to such charitable uses as her executors should think fit, desiring them to have regard to the Infirmary at Bath, for the disposition of some part thereof, as they in their discretion should think fit.

The Bill was filed by the heir at law, praying, that the several devises to the Charities might be declared void, and that the monies might be laid out in land *for his benefit.*

Lord Chancellor (in the course of the argument) said, if money be directed to be laid out in land for a charity, the Court will not declare it void as to the charity, and good as to the purchase of the land; but the devise is totally void, and the same as if it had not been inserted in the will; otherwise it would be to act directly contrary to the intention.

Lord Chancellor (at the close of the argument). Since the statute of mortmain, 9th Geo. 2d, I have endeavoured to give charitable legacies effect as far as I can; but I cannot set up new rules to avoid that statute.

Several questions have been made, some of which are very plain.

1st. As to the three legacies of 500*l.* 50*l.* and 50*l.* they are admitted to be void; but then it is insisted the money ought to be laid out in land, and go to the heir at law; but the Court has no power to make a resulting trust for his benefit, and create a realty which was not so before; the property remains of the same quality as before.

* So it is stated in the Register's Book: but in 2 Vesey, the words are "personal estate, and of that money that should be raised by sale of her real."

3d Question is as to the residuum. It is not controverted by plaintiff that the residue of the personalty belongs to the charity, nor on the other hand can there be any pretence to say, the residue of the money arising by sale of the realty does belong to it; there is no doubt of it, since the case of *Roper* and *Ratcliffe* in the House of Lords.

3d Question. The money arising, &c. being to be considered as real estate, it is insisted, that the Bath Hospital, by the statute that incorporated them, is enabled to take this money, though considered as real estate, by virtue of the words "all sums of money." If that were so, I should doubt if it would support this devise; because it is not a direct desire, but a recommendation only: but laying that out of the way, and supposing it a devise of all the residue of the real and personal estate, I am of opinion this hospital is in the same condition as other charities. There are many powers in the statute that incorporated them, which could not have been given by charter from the King; which might be the reason of their incorporation being by act of Parliament. Now it would be going great length to say when the legislature gives a charter with more powers than the King could, that the construction on those clauses should be different from what it would be in a charter.

Statute 9th Geo. 2, is a general law, and subsequent charters must be subject to that general law: "all monies whatsoever," must mean such as are given according to the general rules of law. The other clause is only to enable them to take without licence, which they could not do otherwise; but then the devises must be according to law.

4th Question, Whether the money arising out of the residue of the real and personal estate shall be so marshalled that the intention of the testator, with respect to the charity, shall have effect; which must be by laying the debts and legacies on the real estate, and all the personal be applied to the charities; but I am not warranted to do that by the rules of law and equity.

What is the ground of marshalling assets? The personal estate is the proper fund for payment of debts, and therefore if the heir at law is sued at law upon a specialty (which he may be), he may come into this Court, and be reimburs-

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out of the personalty: what reason is there to turn this rule quite the contrary way in this case?

It is said, because the residue both of the real and personal estate is given to the charity; and unless this method be taken, the will cannot have effect. What is the will? It is illegal disposition to charity. Am I to set up a compensation for that? It is a devise of all the residue of the personal estate; what is that residue? that which is left after payment of debts and legacies: shall I throw all the debts and legacies on the realty, that the charity may take the residue of the personalty? In the case of the *Attorney General* and *Weymouth*, I went as far as I could to assist the charity. The real estate was there made subject to debts and legacies, as an auxiliary fund to the personal. The personal is the natural fund, and the legacy of 1000*l.* there was to a charity. On that ground, I thought the legacy good, and ought to be paid out of the personal estate. Where the court marshals in the case I put of an heir, he stands in the place of a creditor: shall I say the devise here of the real estate is void, and yet the charity shall stand in the place of the devisee, and have relief out of the personal estate? Besides, there are express words that direct the debts and legacies to be paid out of the personal estate, and only a residue to be given to the charity. My opinion was, it could not be done in the *Attorney General* and *Weymouth*, for there the personal estate was first liable to debts and legacies: so it is here. If I was to marshal the assets, it would be to set up a new rule, and to act contrary to the express words of the testator. If there should be any surplus of the personal estate after debts and legacies paid, the charity will be entitled to it. "The Court declared, the will ought to be established, and the trusts thereof performed, except as to the three legacies of 500*l.* 50*l.* and 50*l.* and the devise of the residue of the money arising by sale of the said testatrix's real estate, to charitable uses; and his Lordship did declare, that the said three legacies, and the devise of the said residue, are contrary to the Act of the 9th Year of his Majesty's reign, and therefore void, and that the same sunk into the surplus of the said testatrix's personal estate." Then follow the usual directions for taking an ac-

count of the said testatrix's personal estate, &c. &c. and applying it in a course of administration. "And if there shall be any surplus of the said personal estate, after payment of her debts, funeral expenses, and legacies, as aforesaid, it is ordered that then the same should be paid to, or retained by the defendants, the executors, upon and for the charitable uses and purposes mentioned in the said will concerning such surplus, and be applied by them accordingly." *Reg. Lib.* B. 1750. *fol.* 611. *a.*

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BROWN *against* NISBETT.

In Chanc. 27 Oct. 1750.

William Burley the elder and Margaret his wife, by deed of 31 July, 1723, *int. al.* assign to trustees a term of years in certain lands, &c. in trust, by mortgage, sale, or otherwise, to raise and levy out of the said lands such sum or sums of money, not exceeding 200*l.* for their two daughters, Margaret and Mary, as the said William and Margaret should, by any writing under their hands, attested by two or more witnesses, direct or appoint; and in failure of such direction and appointment by them jointly as aforesaid, then, as the survivor of them should, by any writing or will, attested, &c. direct or appoint, with interest from such time as the term should commence in possesion, and not before. The term was not to commence in possession till after the death of the survivor of William and Margaret.

In 1724 William and Margaret by deed jointly execute the power, and direct the 200*l.* to be equally divided between the daughters, to be paid to them six months after the decease of the father and mother; and if either of them died before payment, or the money become due, then the money being the share of her dying, to be laid out for the benefit of her executors.

One of the daughters died after the appointment, and before the time of payment.

Power to husband and wife to charge a term of years in lands with such sum or sums of money, not exceeding 200*l.* for their two daughters, A. and B. as the husband and wife should appoint, and in failure of their joint appointment, as the survivors should appoint, with interest from such time as the term of years should commence in possession, and not before. The term was not to commence in possession until after the death of the survivor. Husband and

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Lord Chancellor.—The deed in which the power is contained is to be considered the same as a marriage settlement, a family provision for the daughters.

It was insisted to be a power to appoint by parcels at different times, by virtue of the words *sum or sums* of money. But I am of opinion, that is not the construction; they could not do so. It is a discretionary power, not to raise by parcels, but to raise any given sum, not exceeding 200*l.* as suppose 100*l.* or 150*l.* and, if they jointly had appointed any sum, the survivor could not add to or alter it.

The particular question. There was a joint execution of the whole sum to take place six months after the death of the survivor, and if either of them died before payment, or the money become due, then the money to be laid out for the benefit of the executor of her dying.

Question, if this is a good execution of the power? I am of opinion it is.

Objection. It is void as to part, for they had no power to make any appointment over. But that will not make the appointment void *in toto*.

So far it is a good appointment of the absolute property of the 200*l.* to the daughters themselves, and the appointment over is void.

Question. What effect the daughter dying before the time of payment will have?

It has been insisted, that if a daughter die before time of payment, the portion shall not be raised, but sink into the inheritance, like the common cases of portions reserved on marriage, payable out of the inheritance at a subsequent time, and the daughter dies before that time; and I see no difference. The execution is part of the power; suppose then it had been inserted in the original deed, it would have been so.

Next question. Whether on the death of the daughter Margaret any part remains unappointed, or whether the mother was let in to make an appointment of it?

I am of opinion, as an appointment was made by the

wife, in execution of the power, direct the 200*l.* to be equally divided between the two daughters six months after the decease of the father and mother; and if either of them died before payment, or the money became due, then the share of her so dying to be laid out for the benefit of her executors. One of the daughters died after the appointment, and before the time of payment. This is a good appointment to the daughters themselves, and the appointment to executors is void; but as one of the appointees died before time of payment, her share sinks into the estate.

The joint appointment having appointed the whole, the share of the daughter who died is not the subject of any further appointment.

husband and wife jointly, it was not in their power to alter it.

Plaintiff therefore is entitled to one sum of 100 *l.* and the residue sinks into the inheritance.

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BARTLETT *against* PICKERSGILL.

In Chanc. Trin. 32 and 33 Geo. II.

Parol evidence cannot be admitted to shew that a party having agreed for the purchase of an estate in his own name, had in fact purchased it on behalf of another person.

The defendant bought an estate for the plaintiff, but there was no written agreement between them, nor was any part of the money paid by the plaintiff. Defendant articled for the estate in his own name, and refused to convey to the plaintiff. This bill was brought to compel a conveyance. Question, whether the plaintiff may give parol evidence of this?

Lord Keeper *Henley* (without hearing counsel for defendant).—The question is, whether this evidence is competent or not? this will depend upon the statute of frauds. To allow it in this case would be to overturn the statute. The reason of making that statute was the confusion of property, owing to perjury, either by money or affection. The statute says, no trust shall be of land, unless by memorandum in writing (except such trusts as arise by operation of law). This is not like the case of money paid by one man, and the conveyance taken in the name of another. There the bill charges that the estate was bought with the plaintiff's money: if the defendant says he borrowed it of the plaintiff, then the proof will be whether the money was lent or not; if it was not lent, the plaintiff bought the land.—If I were to allow the evidence in this present case, I do not know a case where the statute would take place. The judges have taken several cases out of the statutes, as agreements in part executed. If Bartlett had paid any money, it would have been a reason for me to admit the evidence, or if there had been any fraud used by the defendant, to prevent an execution of the agreement; but as there is none,

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the bill must be dismissed with costs. *Reg. Lib.* A. 1758, *fol.* 436.

N. B. The defendant Pickersgill having by his answer denied the trust, was indicted for perjury in that particular, and convicted on the evidence of the plaintiff, circumstances confirming the testimony, and proof by other witnesses of declarations by defendant. Afterwards plaintiff petitioned for leave to file a supplemental bill, in nature of a bill of review, stating this conviction; but Lord Keeper *Henley* dismissed this petition 22d November, 1760.

BOSON *against* STATHAM.

In Chanc. 17 *Nov.* 1760. Devise to A. B. and C. and the heirs of the survivor, declared to be in trust for a charity, and therefore void, although no declaration of trust executed according to statute of frauds.

This bill was brought to set aside a will, as being a devise within the statute of Mortmain, 9 Geo. II. and to set aside a release executed by J. B. (ancestor of plaintiff Boson) as being obtained by fraud, he being ignorant of his right when he executed it.

It was admitted by the answer, that the testator, by an instrument bearing even date with the will, and attested by two witnesses only, after taking notice of the statute of Mortmain, requested his said executor to lay out the surplus of his personal estate in the purchase of houses and land for the erecting a school-house in the parish of Hinckley, in Leicestershire; and also requested his trustees to settle his real estates to the same uses and purposes, with power to choose other trustees, &c.

Testator died. John his son, ignorant of this secret trust, released his right, and accepted a legacy of 50*l.* and now the plaintiff prayed to have this release set aside, claiming the real estate as a resulting trust; insisting that the devise, being within the statute of mortmain, was void, and, together with the other plaintiff as next of kin, prayed an account of the personal estate.

N. B. The surviving trustee, against whom the bill was brought, admitted the instrument, and set it forth in his

answer; but submitted the effect and operation, as also the intention of it, to the court, and insisted that, as it was not executed according to the statute of frauds, it could not controul the devise of the legal estate in the will, and denied that the trustees had any knowledge of the instrument until after the testator's death; but he no where insisted that the trustees were to take any beneficial interest to themselves.

It was argued for the plaintiffs that the court would receive this instrument as evidence of the secret trust, and it was compared to the cases on the popish acts. *Unitt* v. *Bartlett*, 15 June, 1757. Bill to have discovery of a trust for a papist. Demurrer, because disabling himself, overruled. *Panton* v. *Lorran*, 27 May, 1758. Defendant charged to be a trustee for a papist, and an issue was directed.

So in cases of superstitious uses. *Attorney General* v. *Jones*, 21 June, 4 Jac. II. the devise was charged to be for a popish mass-house. A trial directed, and the devise decreed void. *Adlington* v. *Can*, 3 Atk.

Edward v. *Pike*, 1 March, 1759. This was a bill brought to have a reconveyance of an estate devised in mortmain. The devise was to trustees, and the testatrix read a memorandum to them requiring them to convey the said estate to the corporation of Salisbury for the charitable purposes mentioned in the will. The trustees in their answer set forth, that when the memorandum was received they said nothing, and denied they had made any promise to convey. But it appearing that conveyances had been actually made to the corporation, and the trust declared accordingly by indenture, the court was of opinion that the trustees took the estate on a promise, and declared the devise void, and decreed a reconveyance.

On the part of the defendant it was said that the devise to the trustees and their heirs could not be controuled or revoked without the solemnities of the statute of frauds. That Lord H. was of that opinion in *Adlington* v. *Can*, that it would be more convenient to break in upon the statute of frauds than the statute of mortmain; that therefore the

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devise to the trustees by the will ought not to be revoked by the second instrument attested by two witnesses only; that supposing the testator meant a trust for the charity, yet it did not appear that the trustee meant to execute it; that the statute of mortmain extended to such trusts only as could be declared by a court of equity, and not to honourary trusts, which depend merely on the conscience *boni viri*.

Lord Keeper *Henley*.—I have considered this question with attention, and it seems to me that these two instruments are full of craft and evasion of the law of the land, i. e. the statute of mortmain. The statutes of mortmain began with Magna Charta. I have heard the late Lord Chancellor go through them all, and conclude with saying, he thought they had been rendered ineffectual by the interpretation which had been put upon them by courts of justice. This is a melancholy hearing to the subject. For my part I will support the law as far as I can, without shaking things which are established.

The question is no more than this, whether since the statute of mortmain a man can devise to a charity on an honorary trust in defiance of the legislature, which has forbid all devises of land in trust for charities. I will always support what I had already laid down on former occasions, *Nemo potest facere per obliquum quod non potest facere per directum*. But what stands in my way to prevent my declaring this a resulting trust? The first objection is that the beneficial devise to the trustees and their heirs by the will, is not to be revoked or controuled by the second instrument, it not being executed according to the statute of frauds, and therefore it can only be taken as an honorary trust, and as such is not within the statute of mortmain; that is to say, that being a fraud against both acts it is not within either. Secondly, that it will be more inconvenient to let in fraud and perjury by opening the statute of frauds than to let in devises to charities by opening the statute of mortmain, when they come in competition.

It is remarkable that this question of a trust declared on a will by an instrument not attested with the solemnities of

the statute of frauds has not been agitated except in the case of *Adlington* v. *Can*, which I shall observe upon hereafter. *Boson v. Statham.*

Suppose this to have been the case of a voluntary settlement. On a sound construction of the statute of frauds, and consideration of the nature of trusts, precedent to that statute, I am of opinion that this second instrument would have been a sufficient declaration of trust.

As to the case of *Adlington* v. *Can*, when it is considered, no difference will be found between Lord Hardwicke's opinion in that case and mine in the present. Three questions were made in that case, but not accurately; for the second was made merely to introduce the old argument that the court would go further in the case of a charity than in any other. In answer to which, the *Attorney General* v. *Spillet*, was cited to shew that charities stand on the same ground with others, and to which every man of sense subscribes. But the only ground of the decree in that case was on the third question, the uncertainty, it being uncertain what was to be given to the charity.

In *Newton* v. *Pelham*, 2 Aug. 1746, bill to discover a secret trust, the answer said it was not for the benefit of the plaintiff. On exceptions it was held insufficient, for the defendant made himself judge of the title, and it was said, *per curiam*, perhaps it might be a trust for a charity.

The present case is extremely different from *Adlington* v. *Can*. For there the will and the paper, declaring the trust, were executed at different times, and therefore there was more room to say it required the solemnities of the statute of frauds. But here the execution of the will and of the trust were at the same time, and the declaration of trust incorporated into the creation of the estate.

But I will speak openly, and declare my opinion generally, that a writing, signed by the party who has power to make the trust, declaring a trust upon the will, is good, though such writing be not attested by three witnesses, according to the solemnities of the statute of frauds.

The statute of frauds was not meant to prevent persons taking trust estates, but only to regulate the proof of them.

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The statute of mortmain meant to prevent a particular species of trusts, i. e. trusts for charities. The one struck at imposture, the other at weakness and superstition. The statute of mortmain meant to prevent honorary trusts or devises for charities, *quâcunque arte vel ingenio*, and the honorary trust infects the will as much as if it were declared in the most solemn manner. To admit a distinction would be to overturn the resolutions on the popish acts, which I by no means intend to do. Declare that the devise of the real estate to the several devisees and the heirs of the survivors of them, and likewise the bequest made of the personal estate to the residuary legatee and executor, were an intended trust for the benefit of a charity, and were, as such, void, by the late statute of mortmain, so far as they relate to such charity and decree, &c. &c. *Reg. Lib. A.* 1760, *fol.* 88.

At Lincoln's Inn Hall before the Master of the Rolls, Dec. 15, 1760.

Dower. In what cases a woman shall be barred of it.

ESTCOURT v. ESTCOURT.

Edmund Estcourt, in 1739, on a treaty of marriage between him and Anna Maria Yate, gave a bond in the penalty of 15,000*l.* to her mother, conditioned that he or his heirs would settle on trustees, with all convenient speed, 500*l.* per annum, in land, to the use of the said *A. M.* for life, to be in full recompence and satisfaction of her dower, and after her decease to the issue of the marriage.

It was proved in the cause that the marriage was treated of by the friends of defendant, A. Maria; that the jointure was thought by her mother to be reasonable; that defendant was then twenty-five years of age; that the bond was either drawn or perused by her uncle, a barrister, and delivered to her mother.

The marriage was had. There was issue a daughter. Afterwards there happened a disagreement, and there was a separation and maintenance.

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Afterwards in 1752, Edmund Estcourt made a settlement of land in pursuance of the bond, to which defendant, A. Maria, was a party, and consenting; but it was proved by a witness in the cause, that he believed the reason of her executing the settlement, and of every step she took in consequence thereof, was to preserve the affection of Edmund Estcourt to her daughter.

In 1758 Edmund Estcourt died, having devised an estate of 4000 *l.* per ann. and his personal estate to strangers, and left his daughter a very moderate provision.

This bill was brought on behalf of the devisees (infants) to establish the will and settlement.

Defendant, Anna Maria, by her answer submitted to the court that she was not bound to accept of her jointure, but ought to have her election to take her dower, and insisted that she was not party to, nor did she agree that such bond should be in full satisfaction of her dower, and though she executed the settlement yet she was not bound thereby, being a feme covert at the time, and that she did it to oblige her husband.

Master of the Rolls.—The principal question in this case is on the claim of the widow, whether the several circumstances and transactions will preclude her from her legal right of dower.

This is a mere equitable question, and resolves itself into two; first, whether the transactions with the circumstances accompanying them, are tantamount to an agreement. Secondly, whether it is such an agreement as is binding on the widow.

The settlement is liberal and reasonable, her fortune being about 4000 *l.*

But it is objected that the widow was not a party to the bond, nor consenting.

As the agreement was in the shape of a bond, it would have been improper to have made her a party; yet from the circumstances attending it she is to be considered as approving it.

Consider it as a proposal in writing. He proposes to settle. She the next day marries him. His proposal in

Estcourt v. *Estcourt*

writing binds him and her, and her immediate marriage must be supposed to be in pursuance of the terms proposed; for if it was not on those terms, she married without any terms, which it would be absurd to suppose.

Her answer does not say she knew nothing of the bond, only that she was not a party, nor agreeing to it.

Her being a party was unnecessary, in respect to herself or her husband; when she performed the condition she had the security; and in respect to him he had the performance.

Suppose I should set aside the bond, I can give nothing to the daughter; therefore it must be good as to her. The case of *Goring* v. *Nash*, is strong, to shew that it cannot be set aside as to one and decreed good as to the other.

Thus it stands on the bond and marriage; consider now the subsequent transactions.

The settlement purports to be made in pursuance of the bond, and in consideration of the marriage.

It is objected that she executed it under coverture and influence of the husband.

The plea of coverture was never less fairly insisted on. They had separated, and she had libelled him in the spiritual court for alimony. Her friends are trustees in the deed of separation, and the terms of it are most submissive on his part; a covenant to let the daughter live with his wife, and not visit him, but at stated times.

The several transactions attending this case are greatly more solemn than twenty fines.

Lawrence v. *Lawrence*,* by Lord *Somers*, and *Lemon* v. *Lemon*, † are founded on a misapplication of the general rule. The rule is that a collateral satisfaction of the wife's freehold must be expressed or necessarily implied.

Vizod v. *Langden*. A bond to settle lands of 14 *l.* per ann. on the wife for her livelihood and maintenance if she survived. Sir *Jos. Jekyll* was of opinion that as there was no proof or averment that it was in bar of her dower, he must decree both. On appeal Lord *King* decreed her en-

* 2 Vern. 365. † 3 Ven. 366, pl. 45.

titled only to the 14*l.* per ann. which was a bar of dower; which shews little regard was had to the former cases.

Estcourt v. *Estcourt.*

But be those cases as they may, this is the case of an express bar of dower, and I am of opinion that the widow is not entitled to it. And the court declared accordingly. *Reg. Lib. A.* 1760. *fol.* 172.

Note. *The Master of the Rolls* said that the objection founded on the statute of frauds was very extraordinary. For it is usually insisted, that an agreement having been in part executed shall be carried into execution, *though not in writing*. But in the present case, though the agreement was in writing, and in part executed, yet *it is insisted* that it shall *not be carried into execution.*

NIGHTINGALE v. LAWSON.

In Chanc. May 8, 1784.

By the decree made on the hearing of this cause, an account was directed of the personal estate of the testator in the usual manner, and of *his debts and funeral expenses;* and the personal estate was ordered to be applied in payment of the *debts and funeral expenses in a course of administration*; the clear surplus was to be paid to the plaintiffs, the residuary legatees; and in taking the account the master was to make to all parties *all just allowances.* The master allowed payments in discharge of *legacies.* Plaintiffs excepted on this point, and the *Master of the Rolls* allowed the exception; but, on appeal, the exception was overruled, the *Chancellor* conceiving payment of *legacies* in such an account to be the subject of a *just allowance*, as the plaintiffs would be entitled to nothing until the legacies were paid. *Reg. Lib. B.* 1783, *fol.* 346.

Under a decree for an account, and applying personal estate in payment of *debts* and *funeral expences*, and directing the *clear surplus* to be paid over, making to the parties *all just allowances*, the Master ought to allows payment in discharge of *Legacies.*

Wilkes v. Tanner 7 C. D. 191

PEGGE v. SKYNNER AND RICHARDSON.

In Chanc. May 22, 1784.

Bill for specific performance of an agreement for a lease from plaintiff to defendants. It was objected that the de-

Pegge v. *Skynner and Richardson.*

fendant Richardson had since become incapable of doing any act in consequence of a paralytic stroke. It was ordered that the defendant Skynner should execute a counterpart of a lease, and also the defendant Richardson, when he should be capable of so doing.

Lord *Thurlow* refused to give plaintiff costs.

ADYE *versus* FEUILLETEAU.

In Linc. Inn. Hall, May 1st. 1783. Lords Commissioners

ON EXCEPTIONS TO THE MASTER'S REPORT.

If an executor lay out the assets on private securities, all the benefit made thereby shall accrue to the estate, yet the executor shall answer all the deficiency: and the particular circumstances of good conduct in the executor cannot prevail against the general rule.

H. Brouncker being possessed of a very large personal estate in the island of Jamaica, made his will on the 15th Feb. 1769, by which he disposed thereof principally amongst his infant children; and made the defendant Feuilleteau and others executors.

On a bill filed by some of the infant legatees to carry the trusts of the will into execution, accounts were directed of the personal estate, &c. and the master having made his report, the defendant Feuilleteau excepted thereto, for that the master had not allowed to him in his discharge a sum of 1000*l.* part of the testator's estate, which the defendant Feuilleteau and another of the executors had lent on bond in Jamaica, the obligor having died insolvent.

It appeared by Feuilleteau's affidavit, that at the time the money was lent, the obligor was in good circumstances; that the interest being 8 per cent, the estate had been increased to the amount of 5000*l.* by the executors having lent money in the like manner; and that the testator had constantly employed his money in that way in his life-time. And under these circumstances he contended he was not liable to be charged with this money.

Hardinge for the defendant Feuilleteau. An executor is not liable for losses, if he did with the testator's property as a prudent man would have done with his own. *Morley* v. *Morley*. 2 *Cha. Ca.* 2. *Jones* v. *Lewis*, 2 *Ves.* 240. *Gibbs* v. *Herring*. *Pre. Cha.* 49. *Harvey* v. *Parsons*,

MSS. "The question was whether an executor laying out money on a security which proved deficient, but which there was no reason to suspect at the time, was or was not liable to answer it. Lord *Northington* said "It has been laid down that a trustee or executor shall answer for money laid out on a security which afterwards proves deficient. I see no case to this point, nor any principle to support it: the sound principle is, that if he dealt with it as a prudent man would have dealt with his own, he is not to suffer by it. If, indeed, it be *crassa negligentia*, it is a breach of trust." So *Brown* v. *Litton*, 1 P. W. 141. A distinction has been always made on this head, whether the insolvent person was a person intrusted by the testator himself, or not; for if he were, an executor is justifiable in intrusting him. *Churchill* v. *Hobson*. 1 P. W. 243. Now in this case, although the obligor does not appear to have been intrusted by the testator, yet this mode of lending money appears to have been chalked out by him.

Adye v. *Feuilleteau.*

Graham, s. s. An executor is not liable to answer for the profits made by the testator's estate. *Adams* v. *Gale*, 2 *Alk.* 106. *Bromfielf* v. *Wytherley*. *Pre. Cha.* 505. And his being personally liable for deficiencies, is the consequence of his having it in his power to turn it to his temporary advantage. Now here the estate has been increased to the amount of 5000*l.* by this mode of laying out the money. It is therefore very hard that the executor should suffer for the deficiency, when he has given up such considerable profits.

Lord *Loughborough*. An executor must be always answerable for an infant's money. The particular circumstances cannot weigh. The executor certainly has behaved very honourably in this case; but it would be dangerous to break through the general rule. Lord *Macclesfield's* opinion in *Pre. Cha.* has often been scouted, and to be sure the distinction there made is a very strange one. It is clear, that if advantage be made, it is part of the trust fund; if deficient, the trustee must answer the loss.

Lord Commissioner *Hotham*.—The court will always discourage lending trust money on private security, though

Adye v. *Eenilleteau.*

larger interest may be gained. It becomes a species of gambling.

The exception was over-ruled.

In Court. Lords Commissioners. May 7, 1783.

HARDY *versus* MARTIN.

ON SHEWING CAUSE AGAINST DISSOLVING AN INJUNCTION.

If a man agree not to do an act, and enter into a bond with a penalty to be forfeited on his doing it, the penalty is never to be considered as the price for doing such act, but the court will relieve by injunction, until the actual damage sustained shall be ascertained by an issue.

The plaintiff and defendant had been co-partners in the business of brandy-merchants. On the plaintiff's quitting the business, he sold the lease and the good-will of the shop to the defendant for 300*l.* and entered into a bond to the defendant in the penalty of 600*l.* the condition of which was, that if the plaintiff should not during the term of 19 years sell any quantity of brandy less than 6 gallons within the cities of London or Westminster, or within 5 miles thereof, or permit any person or persons so to do in his name, or let any house which he might thereafter have within those limits to any other person carrying on such trade, &c. then the bond to be void.

The plaintiff's nephew afterwards carried on that trade within the limits aforesaid, and the plaintiff himself had served a customer with some small quantity of brandy. The defendant brought an action on the bond, and had a verdict for the penalty. The present bill prayed that an account might be taken of the damage actually sustained by the defendant, and that an issue at law might be directed for that purpose, and that on payment of such damage, the defendant might be restrained by injunction.

And the question was, whether, under these circumstances, the court would relieve against the penalty. The cases mentioned were *Cro. Ja.* 596. 1 *Sid.* 442. *Mitchell* v. *Reynolds* 1 P. W. 181. *Tall* v. *Ryland.* 1 *Cha. Ca.* 183. *Roy* v. *Duke of Bedford.* 2 *Alk.* 190. *Rolfe* v. *Peterson.* 6 *Bro.* P. C. 470

Lord *Loughborough.*—The penalty is never considered in this court, as the price for doing what a man has ex-

Hardy v. Martin.

presly agreed not to do. The court will restrain him from setting up a trade in opposition to his own agreement, although he has paid the penalty. The case from 1 *Cha. Ca.* is expressly in point, that the court will moderate the damages to the real injury. As to the case of *Rolfe* v. *Peterson*, that was a case of a demise of land to a lessee to to do with the land *as he thought proper*, but if he used it one way, he was to pay one rent, and if another way, another rent. That is a different case from an agreement not to do a thing, with a penalty for doing it. The former is a case in which this court will not interfere; but this is the case of an agreement not to sell brandy, with a penalty for selling it. I do not say, that under all the circumstances these are excessive damages; but the court will not on motion reject an application for an injunction, while there is a jurisdiction in a court of equity to direct an issue to try *quantum damnificatus*.

Lord Commissioners *Ashurst* and *Hotham* agreed.

FIDELLE *versus* EVANS.

In Court. Lords Commissioners. May 8, 1783.

ON MOTION BY THE PLAINTIFF TO DISMISS HIS OWN BILL WITHOUT COSTS.

Motion by plaintiff to dismiss his own bill without costs, cannot be granted without the express consent of the defendants in court.

A written agreement had been entered into between the plaintiff and defendants, in order to settle the dispute which was the subject of this suit, part of which agreement was that the plaintiff's bill should be dismissed without costs. The plaintiff had served the defendants with notice of motion, but they did not appear to this application. And the court thought they could not grant this motion without the express consent of the defendants, but made an order to dismiss without costs, *unless cause* should be shewn.

In Court. Lords Commissioners. May 8, 1783.

Ex parte BADGER.

PETITION IN BANKRUPTCY.

Surety paying a debt after the act of bankruptcy, but before the commission taken out against the principal, cannot prove this debt under the commission, nor can he stand in the place of the creditor, if the debt be paid by the surety before any proof made by the creditor under the commission.

A father and son had executed a joint bond, in which the father was surety only for the debt of the son. The son paid great part of the debt, but before the remainder was paid, became bankrupt. The father paid 141*l.* residue of the debt, after the act of bankruptcy of the son, but before the commission was sued out; and he had proved this as a debt under the commission, stating specially the circumstances. The creditors at large now petitioned, that this proof might be expunged, the debt having accrued after the act of bankruptcy.

The counsel for the father urged that he was entitled to stand in the place of the obligee for the money paid by him as surety.

Lord *Loughborough*.—If the obligee had proved the debt under the commission, and afterwards the surety had paid it, he might have stood in the place of the obligee: but that not having been done, he can neither come in as a creditor himself, not having paid the money at the time of the act of bankruptcy, nor can the obligee prove any debt, since he is now fully satisfied. This proof must therefore be expunged.

Lord Commissioner *Ashurst*.—No special deposition will do to constitute a debt which did not exist at the time of the bankruptcy; whoever claims as a creditor must make positive proof of the existence of the debt at that time.

In Court. Lords Commissioners. 26th 1783.

TOWNSEND *versus* TOWNSEND.

The rule that trusts are not within the statute of limi-

Francis Townsend, Complainant.

Mary Townsend, widow, Draper and Mary his wife, and Margaret Townshend, —— Plumb and Mary his wife, Richard Hancock, administrator of Susannah his late wife, Thomas Nott, personal representative of Randolph Stevens, trustee, Defendants.

First William Townshend
Martha Norgrove
Second William Townshend
Susannah Capell, second wife
Mary Townshend, widow, defendant
Third William Townshend
Francis Townshend Plaintiff's Father
John and Susannah dead without issue
Two Sons dead without issue
Mary wife of --- Draper, defendant
Margaret Townshend defendant
Mary, now wife of Plumb, defendant
Plaintiff Francis
Susannah, late wife of defendant Hancock

tations applies only as between trustee and cestiu que trust, and will not hold where a claim is made after a great length of time against a trustee by implication of law, more especially where such implication is to be raised upon a doubtful equity.

Townshend v Townshend.

The first William Townshend being seized in fee of the lands in question, on the marriage of the second William Townshend his son, with Martha Norgrove, by indenture dated the 17th of June 1701, between the first William Townshend and the second William Townshend of the first part, Nehemiah Norgrove and Nathaniel Norgrove of the second part, and Martha Norgrove of the third part, the said first William Townshend conveyed the lands to Nehemiah Norgrove and Nathaniel Norgrove, to hold to them and their heirs to the use of first William Townshend, his executors, administrators and assigns, for and during the term of 500 years, subject to the proviso thereinafter contained, with remainder to the use of the 2d William Townshend for life, remainder to the use of the heirs of the body of said Martha Norgrove by said 2d William Townshend, remainder to the use of the heirs and assigns of said 2d William Townshend for ever: with proviso, that if said 2d William Townshend, or the heirs of the body of Martha by the second William Townshend, should pay to the said first William Townshend or his assigns the sum of 50*l.* yearly during his life, and 500*l.* to the executors, administrators, or assigns of the said first William Townshend, then the said term of 500 years to be void.

First William Townshend died, and by his will gave the 500*l.* to his daughter, and the said second William Townshend having paid off the arrears of the said annuity and the said sum of 500*l.* to the executrix, the executrix by indenture of 29th January 1708, assigned the term of 500 years to Ann Ashworth in trust for said second William Townshend, his executors, administrators and assigns.

Second William Townshend (after death of his first wife Martha Norgrove) married Susannah Capel, a daughter of the said Ann Ashworth, and by indenture made after marriage bearing date the 31st January 1708 between 2d William Townshend and Ann Ashworth of first part, and William Rowland and Nathaniel Rowse of 2d part, in consideration of said marriage and of a competent marriage portion paid by said Ann Ashworth to said second William Townshend, *and in pursuance of an agreement made before* said marriage and for settling the residue of said term of 500 years for the

uses thereinafter mentioned, the said 2d William Townshend and Ann Ashworth (by his directions) assigned to said William Rowland and Nathaniel Rowse the residue of said term of 500 years in trust for said 2d William Townshend for life, remainder for Susannah his wife for life, remainder in trust for such child or children of them as the said 2d William Townshend should by will appoint, and in default of appointment in trust for the first son of said William Townshend on the body of his said wife and the heirs of his body, remainder to 2d, 3d and other sons, remainder over.

Second William Townshend had issue by Susannah Capel, Francis (plaintiff's father) his eldest son, who died in the life-time of said 2d William Townshend, and left plaintiff his only son.

Second William Townshend had issue by Martha Norgrove his first wife, 3d William Townshend, who married Mary the defendant, and by indenture of lease and release dated the 26th and 27th days of November 1739, between second William Townshend and Susannah his then wife, of 1st part, 3d William Townshend of 2d part, and Greenbank (a trustee) of 3d part, and by a fine and proclamations levied by 2d William Townshend and Susannah his wife, and 3d William Townshend, the said 2d William Townshend, and Susannah his wife, in consideration of 400*l.* to said 2d William Townshend, paid by said 3d William Townshend, conveyed the said lands to Greenbank, his heirs, and assigns, to the use of said 3d William Townshend, his heirs, and assigns, for ever; with a covenant in the release by said 2d William Townshend, that said premises were and should be free from incumbrances by him; and by deed poll dated 28th of November, 1739, and indorsed on said indenture of 31st January 1708, reciting (in part) said indentures of lease and release and fine, and that the uses of said indenture of 31st January, 1708, were thereby defeated, and that Nathaniel Rowse was dead, the said William Rowland, by the directions of said 2d William Townshend and 3d William Townshend, assigned to Randolph Stevens the said premises for the residue of said

Townshend v. Townshend.

term of 500 years, in trust, to protect the uses limited of the said premises by said indentures of lease and release.

Third William Townshend died in 1755, having, by his will, dated 1751, devised said premises to said defendant Mary Townshend his wife, for life, without any remainder over: he left Mary Draper, and Margaret Townshend, his daughters and co-heirs: and the mother and two daughters afterwards joined in suffering a recovery of the premises, and had settled them to the use of the mother for life, with remainder as to one moiety to one daughter, and as to the other moiety to the other daughter. And the mother had been in possession ever since.

The plaintiff went abroad immediately on his coming of age, and did not return till the year 1775. Plaintiff by his bill claimed to be entitled to the benefit of the terms under the indenture of 1708, and that all deeds might be delivered up to him, and that Randolph Stevens might assign the residue of the term to him, and that he might be let into possession, and for an account of the rents and profits, &c.

Mansfield for plaintiff.—It was contended on part of the plaintiff, that the whole interest in the term vested under the indenture of 1708, in plaintiff's father, as tenant in tail of personal property; and that the indentures of 1739 were therefore void as against him. Two objections had been made to plaintiff's claim: 1st, that the indenture of 1708 was made after marriage, and voluntary. 2d, that plaintiff was barred by length of time. As to the first objection, the indenture of 1708 recites, that it was made in pursuance of articles entered into previously to marriage; at this length of time the court will not presume it otherwise. As to the second objection, the whole transaction was a fraud, and therefore the statute of limitation is out of the question. The trustees conveyed the term by the deed poll of 1739, as a satisfied term. It is impossible to contend that the parties did not know it to be an unsatisfied term. Plaintiff's father was an infant, and therefore could not be satisfied as to his interest. A trust is not within the statute of limitations. But the trustees under indentures of 1739 having notice, ought to be considered as trustees for plaintiff.

Townshend v. *Townshend.*

Kenyon for defendants.—It is rather a difficult presumption that the second wife joined in disinheriting her own issue in favour of the children of the first. The term was in its creation, in effect, a mortgage; and the question is, whether this mortgage is still a subsisting charge. The indenture of 1708 was voluntary, and after marriage. The recital is not even that the articles were in writing; but if it were so, it is no evidence to affect my clients. Then as to the statute of limitations. In 1749 the title accrued to a person capable of making his claim; he does not make it in 1779. The court will always presume a mortgage satisfied at that distance of time. It would be clear in a court of law, and when once the statute of limitations begins to run, no disability of the party shall stop it. It is the common practice, that if the mortgagee gets into possession, and continues in it twenty years, the mortgagor is barred of his redemption; not because the statute has said so, but because it is convenient and wholesome policy; so in this case, either ground of its being a voluntary settlement, or the length of time, is sufficient.

Hollist, on the same side.—The rule that a trust is not within the statute of limitations does not hold in this case. That rule is only between trustee and *cestuique* trust *Llewellyn* v. *Mackworth* in *Barnardiston*, 445.

Mansfield, in reply.—As to the objection of it being a voluntary settlement, recitals in old deeds are always evidence, for the articles are usually destroyed on the execution of the deed; but if the agreement was parol, it is good to make a settlement. It cannot indeed be enforced against an unwilling party, but if it be admitted it is a good consideration for the settlement.

As to the statute of limitations, both in light of a fraud and a trust, it does not affect this case.

Lord Commissioner *Ashurst*.—The first point is, that the defendants are purchasers for a valuable consideration, and the settlement of 1708 is voluntary. If this had been all, we should have thought with the plaintiffs. But as to the defendant's case, they claim under the deed of 1739, and have been in possession ever since. It is said by the

Townshend v. *Townshend.*

plaintiff that the defendants took the term as a trust with notice; but it is unnatural to infer a fraud in this cause, for the mother must be presumed to defeat the provision for her own children. In this view one would rather infer, that the parties knew that the settlement was voluntary, or that some compensation was made to the children of the second marriage. Then as to the trust being an exception to the statute of limitations, the rule holds only as between trustees and *cestuique* trusts. It is true that a trustee cannot set it up against his *cestuique* trust. But this is merely the case of a trustee by implication, and as such affected by an equity; but that equity must be pursued within some reasonable time. Both courts of law and equity preserve an analogy to the statute of *limitations*. The case of mortgagor and mortgagee, is a stronger case than this. *Aggas* v. *Pickergill*, 3 *Atk.* 225; and therefore so doubtful an equity as this, must certainly be within the rule. We therefore dismiss the bill, but without costs.

4 Ves & B 53

In Court Lords Commissioners. June 20, 1788.

PRIDEAUX v. PRIDEAUX.

An estate being sold before a Master when the purposes of the decree did not require it; the sale shall be set aside, although the reports of the several purchasers were confirmed; but the purchasers must be fully reimbursed all their expenses out of pocket.

Mr. *Price* moved, that the biddings should be opened upon the several lots mentioned in the notice, and the sale set aside upon the ground of inadequacy of price, and also of irregularity in the exposure to sale, &c. The decree was, that the personal estate should be first applied to the payment of debts and legacies; and if there was a deficiency, that such part of the real estate as should be necessary, should be sold to make it up. Without a complete account taken of the personal estate, or any application on the part of creditors that appeared, and the mortgagee expressly disavowing it, the premises were advertised for sale, and sold at very inadequate prices; viz. an estate of 900*l.* per annum for 12,000*l.* an advowson for one year's purchase, and other lots at equally small prices. The purchasers paid their money into the Bank and got the decree inrolled, and the Master's report confirmed as early as

possible. Mr. *Price* cited several cases; one of *Ryder* and *Gower*, 6 *Bro.* P. C. 148; another of Lord Halifax's estate, where biddings had been opened merely on the inadequacy of price. The motion was opposed by Mr. *Kenyon*, Mr. *Arden*, Mr. *Hardinge*, and Mr. *Scott* for the several purchasers, on the ground of the inconvenience that arises to purchasers at the Master's Chambers, from the facility of opening biddings; that the difference of price might arise from the different states of war when the sales were made, and of peace now when the application came to the court, and that the irregularities were matters to which the purchasers were strangers, and of which they could not avail themselves to get rid of their bargains, if they turned out bad ones.

Prideaux v. *Prideaux.*

Q. Whether inadequacy of price alone is a sufficient ground to set aside such a purchase?

Lord *Loughborough*.—This is the case of an estate mortgaged and also charged with the payment of debts and several legacies and annuities. After the death of the testator and his widow, who was his personal representative, a bill was filed by two remainder-men for life to have the personal estate applied, &c. The common decree was made on the hearing for an account of the personal estate and also of debts, legacies, and arrears of annuities, and that the personal estate should be applied in a course of administration, and if the personal estate was insufficient the deficiency was to be made good by sale or mortgage of the lands, or a sufficient part thereof. In the report there is no account of the testator's personal estate possessed by the widow, which, however, appears to have been considerable. So that the lands have been sold without any compleat account of the personal estate. Besides which several very heavy charges have been allowed to exhaust this. There were no adverse parties; for the unborn infants, who were tenants in tail, had nobody to protect them. The two real trustees, Lord Lisburne, and Sir C. Bacon, declined to act in the trusts. Mr. Stokes was the third trustee, who was probably a man in business. Without any application of a creditor, notices were published in the Master's Office for the estate to be put up to sale, and at the most disadvantageous time

Prideaux v. Prideaux.

possible. They were great bargains to the purchasers; 900 *l.* per annum were sold for little more than 18,000 *l.* On some of the lots, the advantage was to such amount, that between private parties the sellers would be relieved. But I do not rest my opinion on the inadequacy of the price. I think the estate has been sold at a period of the cause when it ought not to be sold. No creditor required it, or the mortgagee; I am therefore of opinion that the sale ought to be set aside; but as the whole purchase money has been paid in, that must be returned with interest from the time of payment, and the purchasers should have their full costs and allowances for every thing they have been out of pocket.

Lord Commissioner *Ashurst*.—No account has been taken of his personal estate, which ought to have been previous to the sale. It is an ingredient in this case that there is a gross inequality in point of price, but I do not rely upon that.

Lord Commissioner *Hotham*.—I am of the same opinion. On a ground of policy the court ought to be very slow in opening biddings, as much property is sold under the authority of the court; but *justice* must not give way to policy. The circumstances of this case are so strong, as to make it difficult for any abilities to get the better of them; and these cases must be, in a great measure, decided upon their particular circumstances, as there is no principle that will pervade them all, unless the law of the court were, that we could in no case get at a bidding. This case, of all others, is that which would demand the interposition of the court.

The order was as follows—"The court being of opinion, that the said estates have been sold *prematurely*, their Lordships do order that the respective biddings for the said estates, and the orders for confirming the same, be set aside, and the money be paid back to the purchasers; and the Master is to compute interest at 5 *l.* per cent. thereon, and the Master is to take an account of all costs, charges, and expenses, of every kind that the purchasers have been put to; and such interest and costs are to be paid to the pur-

chasers out of the cash in the Bank, on account of rents and profits." *Reg. lib. B.* 1782. *fol.* 698.

JEACOCK *versus* FALKENER.

In Linc. Inn Hall. Lords Commissioners. July 5, 1783.

For Case and Arguments on the original Hearing, vide 1 Brown Cha. Rep. 295.

Lord *Loughborough*.—I am perfectly satisfied that the former decree is right. Thomas Crowder had a sum of 15,000 *l.* given to him at his age of twenty-five, and an allowance of 250 *l.* per annum to that time. There was also a direction that if he should arrive at the age of twenty-two, and then marry with the consent of the trustees, the 15,000 *l.* should be settled upon him and his family. The manner of providing for the Jeacocks is by giving them the residue. But if that should be more than 15,000 *l.* then the surplus to be divided equally between the Jeacocks and Crowder. Testator had before given a bond to trustees in favour of Crowder, to secure 500 *l.* to be paid him at twenty-one, with interest, in the mean time, at the rate of four per cent. In order to shew that the bond is not to be paid, it is necessary to prove to the court such to have been the intention of the testator; and that the testator's bounty was narrowed exactly to that point. The idea that meant a strict equality between the Jeacocks and Crowder, is not sufficiently made out: for Crowder is to be taken care of in all events. The provision for the Jeacocks is certainly secondary to Crowders. A strong circumstance to contradict the presumption that he meant to cancel the bond is, that having given a bond to his housekeeper in consideration of her faithful services, he gave her, by his will, a legacy, which he thereby declared to be in satisfaction of the bond, *she having made her election to take the legacy*, which shews he knew perfectly well what he was about at the time. The cases of portions are not applicable to the present, because there the interest of the eldest son, or the representative of the family, is affected in favour of the younger

Peacock. v. *Falkener.*

children or other branches of the family. This is no portion; it wants the necessary ingredient of a portion, which is providing for the younger branches of the family at the expense of the eldest. But this is the bulk of the fortune. Crowder was entitled as heir (in the common usage of the word, without applying it particularly to real estate) together with the Jeacocks to the whole fortune; equally if it exceeded or amounted to 30,000*l.*; if less, he was better off than the Jeacocks, which is a stronger case.

Lord Commissioner *Ashurst.*—It might have been detrimental to him, to have given him the 15,000*l.* by the will *instead* of the 5000*l.* by the bond, for the bond made the 5000*l.* payable at 21; the 15,000*l.* was not payable till 25; if therefore he had died between 21 and 25, he would have suffered by the exchange. Lord Commissioner *Hotham* agreed.

In Lincoln's Inn Hall, July 15, 1783.

HEMINGS *versus* MUNCKLEY.

William Clutsam by his will, dated in January 1778, after giving some specific and pecuniary legacies, gave the residue of his personal estate and effects to trustees therein named, in trust to lay out the same in the purchase of government securities, and to pay the same and dividends thereof as therein after mentioned. He willed that the same should be divided into sixteen parts, "and that his said trustees should pay five full sixteenth parts thereof to his danghter Rachael Clutsam, on her attaining her age of twenty-eight years, *or* day of marriage which should first happen *provided his said daughter should marry with the approbation of his said executors in trust*, or such of them as should be then living;" and the interest to be applied in the mean time for her use. He then gave the other eleven sixteenth parts amongst his other four children. He then willed that "in case any or either of his said sons and daughters should happen to die before his, her, or their part or share, parts or shares, should become payable as aforesaid, then

Hemings v. Munckley.

the part or share, parts or shares of him, her, or them so dying as aforesaid, should go and be paid to and amongst all and every of his children who should then be living, and the issue of a deceased child or children (if any) *per stirpes* and not *per capita*, at the same time or times as his, her, or their original part or share, parts or shares were thereby made payable."

Rachael Clutsam survived the testator, and married at the age of eighteen without the consent of the trustees and died at the age of twenty years, leaving one daughter.

And the question was, whether the proviso of her marrying with consent was to be considered as a condition, and the legacy therefore gone, or was to be considered as *in terrorem* only, and in that case vested on her marriage.

The husband of Rachael claimed both as adminjstrator to his wife and to his infant daughter.

Scott, for the husband, insisted that the clause was *in terrorem* only, and that she was entitled to the five sixteenth parts on her marriage, and he cited the case, of *Underwood* v. *Morris*, 2 *Atk.* 184, as directly in point; but Lord *Loughborough* doubted the authority of that case, and without much consideration determined that Rachael did not take under the will, but he allowed her daughter to come in with the other brothers and sisters for a share of her five sixteenth parts, under the description of "the issue of a deceased child."

HOLMES *versus* HOLMES.

In Lincoln's Inn Hall. Lords Commissioners. July 17, 1783.

A father makes his will and gives a legacy of 500*l.* to his son; and afterwards takes his son into partnership and gives

Holmes the father, who was a jeweller, by his will dated in November 1771, gave his son 500*l.* and 2000*l.* to four unmarried daughters. Then gave his son the *utensils* of his trade (which were of trifling value) and gave the residue of his personal estate to his wife for life, and after her death he gave further legacies to his daughters; to some 500*l.* and to others 1000*l.* and if any surplus, to be divided

Holmes v. *Holmes.*

him half the stock in trade to the amount of 15,000*l.* This advancement shall not be taken in satisfaction of the legacy.

amongst all his children who should be then living (there then being seven in all.) In 1779, he took his son into partnership with him, and by the deed of partnership the stock was to be 3000*l.* to be brought in equally, and they were to be equally entitled to the profits. The father brought in the whole capital, and it was understood by the family that he meant to give the son the half of the stock. The children who were of age by their answer admitted this, and there was parol evidence of declarations of the testator at different times that he meant to bring his son into partnership and to give him half the stock, and even the whole, and that he told one witness that he had brought his son in and had given him 1500*l.* The question made in this cause was whether this advancement was a satisfaction of the legacy of 500*l.* and it was held not to be a satisfaction, as not being *ejusdem generis*, and that it must have been the testator's intention that plaintiff should have both. Lord Commissioner *Hotham* relied on an argument for the plaintiff, that if the legacy had been a moiety of the stock, and afterwards 500*l.* had been given, it could not have been a satisfaction.

In Lincoln's Inn Hall. Lords Commissioners. July 23, 1783.

HICKS *versus* RAINCOCK.

DEMURRER

Demurrer will not lie to a bill stating a sale of the office of secondary to Wood Street Compter, and praying an account of the profits of the office, for upon demurrer the nature of the office does not appear, nor consequently

Defendant Raincock had the office of secondary to the Poultry Compter, and Bolton (another defendant) had the office of secondary to the Wood Street Compter, in trust for defendant Raincock. By indenture, defendant Raincock, in consideration of 1200*l.* assigned over to plaintiff one fourth part of the office of secondary of the Poultry Compter, and in consideration of 812*l.* assigned over to Plaintiff one fourth part of the office of secondary of Wood Street Compter: plaintiff had paid the money, and the bill was for an account of the profits of the places, and to have one fourth part paid over to him, &c.

Hicks v. *Raincock.*

Defendant demurred to the whole bill, except so much as relates to the promissory note, therein mentioned; and for cause shewed that the transaction stated in the bill, appeared to be illegal, and therefore void. On argument of the demurrer the statue of 5 and 6 *Edw.* 6th, prohibiting the sale of certain offices, was relied on by defendants. Plaintiff insisted, First, that it was necessary for defendants to shew that the office is within the statute, and that it ought to have done so by way of plea. Secondly, that demurrer was bad in point of form, for that it ought to state specially the parts of the bill demurred to, and that it was not sufficient to demur to the whole with an exception; and for that purpose were cited *Chetwynd* v. *Lindon*, 2 *Ves.* 451. *Salkeld* v. *Science*, 2 *Ves.* 107.

whether such a sale is illegal under *stat.* 5 & 6, *Edw.* 6. Demurrer to the whole bill with an exception to a small part may be good in point of form.

Lord Commissioner *Ashurst.* It does not sufficiently appear what is the nature of this office: there is nothing to bring it properly to our knowledge, whether it is or is not within the statute. As to the objection to the form of the demurrer, I should have no doubt. It is merely an exception of a very small part of plaintiff's demand, and is the best way of demurring.

WARREN *versus* WARREN.

In Lincoln's Inn Hall, Lords Commissioners. July 26, 1783.

Sir John Borlase Warren, and Carolina his wife. Sir George Warren, K. B. William Cockayne, Lieut. General James Johnstone and John Williams, Plaintiffs.

Arnold Warren, Augustus Parkyns and Frances his wife, Philip Gell, Graham Chappell, Francis Hurst, Francis Warren, Elizabeth Warren, Farmer Shillingford and Ann his wife, and Edward Bloxham, Defendants.

By marriage settlement the husband's estates were settled to the uses of the marriage and (amongst others) a term was created for raising a sum

John Borlase Warren (plaintiff's father) being tenant in tail of premises in Bucks, Oxfordshire and Nottinghamshire, by indentures of lease and release of the first and second days of July 1754, the release made between said John Borlase Warren and Bridget his wife of first part, Josiah Richardson of second part, Arnold Warren and James

Warren v. *Warren.*

of 10,000*l.* for the younger children to be taken equally amongst them. The husband by his will made 4 years after made several dispositions by which it appeared that he had totally forgot the existence of any marriage settlement and then bequeathed to his younger child, if he should have but one, 5000*l.* and if more than one, 2000*l.* apiece, and subjected his personal estate to the payment thereof, but if the personal estate should not be sufficient, he directed the same to be raised by mortgage of the settled premises. There were two younger children of the marriage. The provisions made by the will shall go in part satisfaction of what was provided by the settlement; and only 10,000*l.* shall be raised.

Warren (two brothers) of third part, and Nicholas Hurst, and Francis Hurst of fourth part, it was witnessed that for barring all estates, reversions, and remainders in and upon the said premises, and for settling and assuring a jointure on the said Bridget his wife, and for securing portions and a proper maintenance for his daughters and younger sons, he the said John Borlase Warren did grant, release, and confirm to said Josiah Richardson, his heirs, and assigns, all the said premises, in order that he might be tenant of the freehold, &c. for the purpose of suffering a common recovery. And it was thereby declared that the said recovery, when suffered, should enure to the intents and purposes therein after mentioned (that is to say) to the use of himself for life, then to trustees to preserve, &c. then to his wife (as to part) for her life, then to trustees for a term of 500 years without impeachment of waste upon trusts thereinafter mentioned, then to the use of plaintiff and the heirs male of his body, and to the second and other sons in tail male successively. And as to the term of 500 years he declared the trusts to be that the said trustees, their executors, administrators, and assigns should out of the rents, issues, and profits of the said premises, or by sale, mortgage, or disposition of the same, or any of them, for all or any part of the said term of 500 years, or by any other ways or means, either in the life time of the said Borlase Warren, if he should so direct by writing, or after his death, levy, raise, and pay the sum of 10,000*l.* for the portion and portions of all and every the child and children of the said John Borlase Warren on the body of the said Bridget his wife begotten or to be begotten (other than an eldest or only son) to be paid and equally divided amongst all and every such child or children share and share alike; the shares of the daughters to be paid at their ages of 21 years, or days of marriage, which should first happen, and the shares of the younger sons to be paid at their ages of 21 years, or sooner for their preferment, if the said trustees should so direct by writing (the said John Borlase Warren being dead); and in case the respective times of payment should arrive in the life time of John Borlase Warren, then the same to be paid within six months after his decease with interest at four per

cent. from his death; with provisos for vesting the said portions in said younger children at periods of 21 years and marriage respectively, and for benefit of survivorship in case of any of them dying before such periods respectively, with directions for their maintenance from the time of the death of testator to payment of said portions not exceeding the interest thereof. And in the said indenture was also contained a proviso that in case the said John Borlase Warren should in his life time give to any of said younger children any sum or sums of money for and towards his, her and their portions and advancement and by writing under his hand and seal, declare the same to be towards the portion or portions thereby provided, that then such younger children should after the death of him the said John Borlase Warren have only so much, and such further portion or portions by virtue of said indenture as with the said sum or sums of money so advanced by him in his life-time would complete the portion or portions so thereby provided for him, her, or them respectively.

On the 14th of November, 1758, John Borlase Warren made his will, stated in the bill verbatim, "I, John Borlase Warren &c. give and devise to Arnold Warren and James Warren and Nicholas Hurst, all my manors, lands, &c. (same premises as in the settlement), to hold the same in trust for my son, John Borlase Warren (plaintiff) and the heirs male of his body to be lawfully begotten, and for default of such issue in trust for all and every the sons and son, and the heirs male of their several bodies to be begotten by me on the body of Bridget my now wife, to take as they shall be in priority of birth, &c. (with remainders over) And whereas, *I have made no provision* for the said Bridget my said wife, either by settlement or otherwise, I do hereby declare my will to be, that, in case my said wife shall survive me, my executors shall yearly during her life pay her the clear sum of 600*l.* in full satisfaction and bar of dower, and I do hereby declare my will to be, that in case there shall be one younger child only living at my decease, and my said wife shall not be with child, with any child or children, then I give to such younger child 5000*l.* but if

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more, I give 2000*l.* apiece to such younger children, and the child or children with which my said wife shall be with child, to be paid by my executors as they shall respectively attain their ages of 21 years; and in the mean time and till they shall attain that age, the interest of each child's respective legacy shall be applied towards its maintenance and education in such manner as my executors shall think fit. I do hereby subject my whole personal estate to the payment of the said 2000*l.* apiece to my younger children, and empower my executors to raise the same by mortgage immediately after my decease, in case my personal estate shall fall short for that purpose." And he appointed the said Arnold Warren, James Warren, and Nicholas Hurst, executors.

John Borlase Warren, the testator, died 1763, leaving plaintiff his eldest son, and defendant Arnold Warren, and Frances wife of Parkyns, then Frances Warren his two younger children.

The only question in the cause was, whether the two younger children, Arnold Warren and Frances Parkyns, were entitled to the 10,000*l.* under the settlement, and the 2000*l.* apiece under the will; or whether they should be put to their election.

The other parties in the cause were trustees in the marriage settlement of plaintiff's and defendant Parkyns and his wife.

For the argument and judgment, vide 1 Brown. Cha. Rep. 305.

Henley Lord Chancellor.

Easter Term 1 Geo. 3d.

Byde v. Byde.

BYDE *versus* BYDE.

(CITED IN WARREN *v.* WARREN.)

Mary Skynner Byde, Complainant.

Thomas Plummer Byde, Esq. John Byde, Esq. and Ann Bowler, widow, Defendants.

Ralph Skynner Byde, having issue by a former wife, one son John Byde, on whom his lands stood settled, upon his second marriage by settlement dated the 3d of July

1699, in consideration of the marriage and marriage portion settles other lands on himself and his wife Sarah for their lives and the life of the survivor, remainder to trustees and their heirs, *in trust to sell the same to his son John Byde for 5000l. for the provision and maintenance of such children as he should have by his second marriage* to be given and distributed to and amongst such child and children, some or any of them, as he and his wife should by deed or writing, &c. appoint, and in default of such appointment *to such children equally to be divided between them as tenants in common, if more than one, if but one then the whole to such only child*, with remainder in default of such issue to his own right heirs; and if the said son should refuse to accept the lands at that price, or should be dead before the event happened, in trust to sell for the most money and distribute the same in manner aforesaid. Ralph Skynner Byde having three children living by his second wife, and she being pregnant, and he being seized in fee of considerable freehold estates by his will dated the 10th of July 1705, reciting that his meaning was to provide for the maintenance of the said children gave 1000*l. to each of the three children* by name, *as and for his and her portion respectively*, and 1000*l.* to such child as his wife should be enciente with, to be paid at their respective ages of 21 *years if males, if females at* 21 *years, or marriage, with interest at* 4 *per cent. per annum for maintenance in the mean time* And if any should happen to die before, &c. the portion of such or children to go to the survivor or survivors, and if all the children of the second marriage should die then to go to the defendant, the son of the first marriage; and he charged all his lands whatsoever (of which he had any power to dispose) with payment as well of the said portions as of his debts and legacies. After the testator's death John Byde the son, paid the 1000*l.* portions and gave notice to the trustees *that he accepted the purchase upon the* terms of the settlement, and called upon them for a conveyance; but before any conveyance could be made he died, leaving the defendants his cousins, his devisees and executors: the testator's widow died in 1755.

Byde v. Byde.

Byde v. *Byde.* The plaintiff, as only surviving child of the second marriage, brought the bill to have the purchase completed and to be satisfied the 5000*l.* out of John Byde's assets over and above the portion she had received under the will; and the only question was, whether she was entitled to both or only one of the provisions.

Pratt Attorney General, *Yorke* Solicitor general, and *Perrot* for plaintiff, insisted that the gift by the will could not be taken as a satisfaction of the settlement. They seemed to admit, that by the general rule of the court, where a portion is given by a parent by a will to a child entitled to the same provision under a settlement, the court presumes the Testator meant it as a satisfaction of the settlement, unless there were circumstances to rebut that presumption; but it was urged the testator's intentions could not be such here; first, because the sum was not the same, but less; the issue of the second marriage being entitled to 5000*l.* under the settlement, and to 4000*l.* only by the will; secondly, because it is not of the same nature: by the settlement they are made tenants in common; by the will the portions are to survive; that under the will by one contingency they might take the whole land, for, in case of the heir's refusing to purchase, the issue of the second marriage would be entitled to the whole land; that the devise was made *diverso intuitu*, viz. for their provisions and maintenance during the life of the mother, because under the settlement the trustees could not raise the portions till after the mother's death; that the court had never held that a less sum should go in satisfaction of any greater, because they would not preclude a testator from being bountiful as well as just. Cases cited: *Bloyes* and *Bloyes*, cited in 2 *Vern.* 111. *Thomas* and *Kemish*, *Ibid.* 348; *Copley* and *Copley*, 1 P. W. 147. *Jesson* and *Jesson*, 2 *Vern.* 255. *Grimes* and *Allins* 29th and 31st January, 1751, Lord *Hardwicke* Chancellor. *Savil* v. *Savil*, *Vin. Abrtit. Portions* 442. *Select Cases in Equity* 32.*

De Grey and *Hoskins* contra, argued that this case was

* And 2 Atk. 458.

very different from all the cases of satisfactions between debtor and creditor, for there equity supposes the testator meant to satisfy, because it is natural every man should be just, before he is bountiful; but the cases of children go upon another ground, because equity is averse to double portions, which would greatly incumber the inheritance, and therefore presumes wherever a parent has given a child a portion, it was all he meant that child should take, unless there are circumstances; and wherever a child is entitled to a portion under a settlement, and a parent gives by will another, it is presumed to be in satisfaction, unless the contrary appears. As when lands at common law were given in frank marriage, such child could not come in as a co-parcener. And as to its being a less sum, it was said, that could be no objection; because a less sum raised at one time, might be more than equal to a larger at another; so in *Jesson* v. *Jesson* there was no doubt of its being a satisfaction *protanto;* the only question was, whether it should not be taken as a satisfaction for the whole. Secondly, as to the testator's intention, which alone could over-rule this principle, they said it was clear that he meant to give this 4000*l.* in satisfaction of a settlement, that is, as far as he could by offering something conditional to them in lieu of their provision under the settlement. He has given this as a portion *eo nomine*, which they might, it is true, have rejected, and claimed under the settlement. But in fact the provision under the will was more beneficial, for that was present and with interest in the mean time until coming of age by way of maintenance; whereas that under the settlement was future and uncertain when to happen, being not raiseable till after the mother's death (who was young) and no interest in the mean time, and this was still more forcible in the present case, because the children had accepted the portion under the will upon coming of age. *Byde* v. *Byde.*

Lord Chancellor.—The bill is brought by the plaintiff to have her share of portions which were to be raised under the deed of settlement of the 3d of July 1699, and her claim is founded on this; that the father meant to give the children of the second marriage portions by his

Byde v. *Byde.* will independent of what they might be entitled to under the settlement. There are two objections to their claim; the first (which the plaintiff's counsel have anticipated) is that of having a double portion; the second, which I think is very material, is that they accepted the portions given under the will. It is insisted, that where a devise goes in satisfaction, it must be an equal sum; secondly, equally beneficial; and thirdly, of the same nature; and I agree this is so, where it is a simple devise in satisfaction of a precedent debt. But I think none of these cases apply to the present, nor to any case wherein the intent of the testator is manifest, as I think it is here, and expressly declared in his will. For every man, both at law and in equity, may dispose of his property as he will. Therefore the material question is whether the testator has declared his or not. The case in short is no more than this. R. S. Byde settled lands on himself for life, remainder to his wife for life, remainder to trustees and their heirs, in trust after the death of the wife to convey to J. Byde his son and heir by a former wife, upon his paying 5000*l.*; and if he refused or neglected to purchase the same, then to sell for the most money, and distribute the same equally amongst the children of the second marriage for their provisions and maintenance, in case the father and mother had made no joint appointment in their lives. After this, without taking any notice of the settlement, by his will, he gives 4000*l.* to such children, 1000*l.* to each of them as his and her portion. It is insisted that I must construe this not according to the entire idea of the word, and the grammatical sense of it, but that I must take it as a farther portion or as part of portion. Now with the utmost attention I have been able to give I cannot find out any one intimation in the will to warrant me in putting so narrow a construction upon the word, and the whole "collocation," (as the grammarians call it,) of the sentence indicates, that the testator meant to express one entire thing, *viz.* a portion or full portion; and as he knew there was a provision under the settlement, he could never express himself in words so entire in their meaning, if he had intended to give an *additional* portion. This seems to me an insurmountable

reason arising from the context of the will to take it according to the express sense of the words, and that his intention was, they should have their option to take it in lieu of the provision under the settlement. If this be so, then the objections taken, and arising from the inequality, &c. do *not* remain for me to determine, for they have been determined already by the best judges, viz. by the parties themselves, by acceptance of legacies as portions. If a man gives a matter of curiosity or art, as a fine picture, by way of satisfaction of a debt, and the legatee accept it, though the value be less than the debt, there could be no ground for equity to interpose; for so equity would controul the natural power of one party to give, and the other to accept what is offered. All the cases where the testator's meaning is not plain, are not applicable to the present. I am clear, that the testator's was disjunctive, and that he had not particularly in view either the 4000*l.* or 5000*l.* but meant to each child an election to accept or refuse such share or legacy under the will. Dismiss the bill without costs as against the Bydes, and 40*s.* costs against defendant Bowler.

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SPELMAN *versus* WOODBINE.

In Linc. Inn Hall, Nov. 1st. 1788.

MOTION THAT THE MASTER MIGHT TAX COSTS REFERRED TO HIM BY AN ORDER OF APRIL, 1783, AS BETWEEN ATTORNEY AND CLIENT.

Defendant had been employed by plaintiff as an attorney to conduct several matters relative to the improvement of the navigation of the river Nar, in Norfolk, and in soliciting an act of parliament for that purpose, and defendant's bill on that occasion amounted to 514*l.* Defendant had likewise another bill on plaintiff amounting to 183*l.* for expenses attending the sale of a very large estate of plaintiff's. Plaintiff filed this bill against defendant, praying that these bills might be subject to the taxation

Spelman v. Woodbine.

of a Master of this court, and for an injunction to prevent defendant from proceeding at law in respect thereof.

In April 1783 the court made an order for the Master to tax all the defendant's costs both at law and equity; and the present motion was that such costs might be taxed as between attorney and client, and not as between party and party. And it was insisted on the part of defendant, that the only object of the suit being the taxation of the two bills of 514*l.* and 183*l.* which was for business, &c. done as an attorney, the costs of this suit ought to be taxed in that manner, especially after the very improper behaviour of plaintiff.

But the court said, that the rules as to taxation of costs, as between attorney and client, did not apply when they appeared in this court as party and party in a cause; that no application could be made under the statute in the present case, and therefore the common rule must hold of taxing costs as between party and party.

In Chanc. 17 *Nov.* 1783.

TREVES *versus* TOWNSEND.

Assignee of Bankrupt charged with interest on money belonging to the estate, employed by him in his own business.

In 1766 a commission of bankruptcy issued against Beale and others, co-partners; and thereupon Townsend, Russell, and another were chosen assignees. Beale and the other having carried on the negotiation of accommodation bills to a very large amount with several persons who were also bankrupts, the assignees of Beale, &c. deferred proceeding under the commission, in order that the several holders might prove their debts and receive dividends under the other commissioners before they made any claim on the estate of Beale. In fact no dividend was ever made. The clerk of the commission was dead and all the papers lost. Townsend had received considerable parts of the bankrupt's effects; Russell had also received some small part, but he died in 1773. In 1782 the creditors renewed the commission; but the then Lord *Chancellor* (Lord *Thurlow*) thought the creditors could

not get at the effects received by Townsend and Russell without filing a bill in Chancery. The present bill therefore was brought by the creditors against Townsend and the executors of Russell for a discovery of the several facts, and for an account of the money received by them, &c. It appeared by Townsend's answer, that he had kept the money so received by him on account of the bankrupt's estate in common with his own at his banker's; but he swore that he generally had there more than the amount of such receipt; and the only question in the cause was whether Townsend and the executors of Russell should be charged with interest for the money kept in their respective hands.

Madocks, *Scott*, and *Bicknell* for defendants.—Unless it is a matter of right in the plaintiffs to demand interest of the defendants, this is not a case in which the court will so charge them as a matter of discretion. This is not a matter of right, for though if an assignee or any other trustee does make interest of money in their hands, such profit will belong to the creditors, or to the *cestui que trust*; yet they are not obliged so to do, for they must do it at their own risque; or if in very gross cases the assignees might be chargeable, yet this is not such a case. Here the assignees only kept the money at their own banker's, instead of a banker appointed by the creditors according to the statute, and they had always sufficient to answer the creditors demands whenever they should be called upon; and unless the court is called upon as a matter of right, they will not charge an assignee; for it is very beneficial to the commercial world to induce honest men to take upon them the office of assignees. It is an office of much trouble without reward, and in this case it is particularly hard that the creditors should be allowed to make this demand after such a length of time, when they might have compelled a dividend whenever thought proper.

Lord *Loughborough*.—As to Russell's executors, they cannot be looked upon in light of assignees, and as executors, are not to pay till called upon; and though you might charge Russell's estate in respect of the money

Treves. v. *Townsend.*

retained in his hands in his lifetime; yet as the money is comparatively small, it is scarcely an object. But with regard to Townsend, I was surprised to hear it argued that they were not to make a dividend, or to take an active part in settling the bankrupt's affairs, unless called upon by the creditors: and as to discouraging honest men from taking upon themselves the office of assignees, no honest man can ever have any difficulty. The effect of giving in to this doctrine would be that it would be canvassed for as an office, and no honest man would ever be appointed. There is nothing so likely to make the bankrupt laws reprobated, or to bring about their annihilation: now this is the grossest case that imagination can make. Their only excuse is, that they could not make a dividend, because they were so very negligent: they never called upon the clerk of the commisssion; and he is now dead, and all the papers are lost, and the expense of a suit is brought on the estate by their negligence. Now what ground is there for not charging them with interest? The money being mixt by Townsend with his own, it is just as clear that a profit has accrued, as if it had been specifically placed out. Townsend was employed in trade, and knew how to make the most of money; money is part of a merchant's stock in trade, a circulating capital on which profit arises. The sum in the banker's hands was fluctuating, and he must have been an unthrifty merchant, if he did not make great profit of the money by discounting notes, &c. Since 1768 the sum of 1936*l.* has been so employed by him: if the court should suffer him to do this, when the very nature of the trust reposed in him required that he should not keep it in his hands, when will there be a sufficient ground to charge him? Townsend therefore must pay the interest at 5 per cent. and pay all the costs of this suit, and also all the subsequent costs arising from the inquiry in the Master's office, which has been occasioned by his neglect.

This cause came on to be re-heard before Lord *Thurlow*, June 18, 1784, and on part of the petitioner it was prayed that before the petitioner should be charged with interest, it should be referred to a Master to inquire whether he made

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any and what interest of the money in his hands. On the other side his own answer was read, by which he admits that he used the money in his own trade in common with his own.

Lord Chancellor—As to the inquiry prayed, it is totally out of the case. His own answer admits sufficient. The only inquiry I am inclined to direct is, whether he did at all times during that period hold in his hands a sum of money sufficient to satisfy the demand; but that the petitioner does not wish to go into: my doubt is only as to the rate of interest. I agree that 4 per cent. is the interest usually given by this court, and which, indeed, it never exceeds but upon a special case. Then is this such a case? They have, I think, established the fact of Townsend's having used it in his trade. Then is the advantage made of it 4 or 5 per cent.? for if he has made 5 per cent. interest of it, I cannot give less; now he certainly must have made 5 per cent. on his own stock in trade. I again say, I never give more than 4 per cent. on the simple case of detention; but I think this is a case in which 5 per cent. should be given.

COUNTESS DOWAGER GOWER *versus* EARL GOWER.

In Linc. Inn-Hall, Dec. 6, 1783. Lords Commissioners.

By marriage settlement J. G. had a power of appointing portions for daughters to the amount of 16,000*l.* under a term of years created for raising the same: he appointed 13,000*l.* part

By marriage settlement, bearing date 12th March, 1711, made on the marriage of John late Earl Gower with Lady Evelyn his first wife, certain manors, &c. in the counties of Salop, Stafford, and York were, amongst other limitations, limited to trustees for the term of 300 years, in trust, for raising such sums or sum of money as the said John Earl Gower should by will or deed, attested as herein mentioned, limit and appoint for the portions of his daughters by his said wife (in case there should be issue male of the said marriage) not exceeding the sum of 16,000*l.*

Gower v. *Gower.*

The said John Earl Gower on the marriage of Gertrude his eldest daughter with the Duke of Bedford, did, by deed poll direct the sum of 5000*l.* to be paid to the uses of the marriage, and took an assignment from his said daughter of her interest in the same term. He afterwards in the same way appointed to his daughter Lady Sackville, 2000*l.* and to his daughters Lady Mary Wrottesley and Lady Gower, 2000*l.* each.; each of whom covenanted to make such assignment of their interest in the said term to said Earl John as he should direct and appoint.

In 1744, upon the marriage of Levison Granville, his eldest son (the present defendant Earl Gower), in the marriage settlement Earl John and the present Earl covenanted that the manors, lands, &c. comprised in the said term of 300 years were free from all incumbrances whatsoever done by either of them; and this covenant was drawn by *Mr. Fazakerly* in the fullest and most extensive terms.

On 21st December 1749, Earl John made his will, and thereby reciting the limitation of the said term for 300 years by his marriage settlement in the year 1711, and reciting that he had in pursuance of the power thereby given to him, appointed the whole sum of 16,000*l.* to be raised for daughters' portions, and that upon the respective marriages of his above-named daughters, he did direct that the several sums herein before-mentioned should be paid to them or for their advancement, amounting in the whole to the sum of 13,000*l.* he did by his said will appoint the farther sum of 3000*l.* residue of the said sum of 16,000*l.* to be paid to his daughter Lady Elizabeth Levison Gower, in part of her fortune, within six months after his decease.

The present bill was brought by the plaintiff as executrix of Earl John against the several defendants, and coming on this day for further directions after the Master's report, the chief point was whether plaintiff, as executrix of Earl John, was entitled to have the whole 16,000*l.* raised out of the said term of 300 years, and paid to his estate, as having been advanced his said daughters in marriage, and therefore

thereof among four of his daughters, on their respective marriages, and took assignments from them of their interests in the said term. On the marriage of he eldest son, J. G. and the eldest son *covenant* that the settled estate is *free from all incumbrances.* After this J. G. makes his will, and appoints the remaining 3000*l.* to his only unmarried daughter. Notwithstanding the clear intention of J. G. to keep the term alive for his benefit, yet his covenant in the son's marriage settlement will bar his claim of any benefit from it as against the parties interested under that settlement.

standing in their places as to their interests under the said term.

For the plaintiff it was insisted that Earl John never meant to advance the several sums of money to his said daughters out of his own pocket, and independent of their provision under the marriage settlement, but merely intended to appoint their several portions according to the power in the settlement, and for their accommodation advanced to them on their marriages, instead of letting them wait until it should be raised regularly under the term; that this intention appeared by the appointment by deed poll, and by his taking assignment from the Dutchess of Bedford, and covenants from his other daughters, to assign their interest under the said term to him; and that by his will in 1749, he considered the term as still unsatisfied, for he speaks of the 3000*l.* still remaining to be raised under it, and appoints that to his daughter Lady Elizabeth Levison Gower; and therefore as having advanced his daughters as aforesaid, and standing in their places, he was entitled to the benefit of the term in respect of the money so advanced; and consequently the present plaintiff is now equally entitled as his executrix.

For the defendant, it was said that whatever might be Earl John's intention at the time of making such advancement to his daughters, it does not affect this question, which is, whether plaintiff shall be allowed to insist on the benefit of this term, notwithstanding the covenant entered into by Earl John and the present Earl on the present Earl's marriage, whereby they covenanted that the said premises were free from all incumbrances done by them; that the issue under a marriage settlement being purchasers for a valuable consideration, are entitled to the benefit of that covenant as against Earl John and all claiming under him; that the terms of the covenant were remarkably full and extensive, and that therefore Earl John must be considered as having relinquished all claim he might have under the term when he covenanted against all incumbrances.

Plaintiff replied, that the covenant was a general one, which was inserted of course, and cannot be supposed to

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have had relation to the term for 300 years; that by his will in 1749, which was subsequent to the marriage settlement in which this covenant was inserted, it appeared that Earl John considered the term as still existing; but if the court should think the plaintiff barred from claiming the benefit of the term, as against the issue of the present Earl in respect of the said covenant; yet they insisted that as the present Earl had joined in that covenant, there was nobody during his life entitled to the benefit of it, and consequently that plaintiff would be entitled to the interest of the 16,000*l.* during the life of the present Earl.

Lord Commissioner *Ashhurst*.—(After stating the case). John Lord Gower certainly meant at the time he made the advancement to the daughters to keep the term on foot: this appears sufficiently plain, and this he had a power to do. If therefore the question was between his executors and the persons claiming under the settlement of 1711, plaintiff would clearly be entitled; but the question is, whether Lord Gower did not by some subsequent act bar himself of that benefit. Now it seems to me that by his joining in that covenant in the settlement on his son's marriage, he has barred himself and any person claiming under him; for the covenant is in the most explicit and full terms possible: but it is said that from consideration of the circumstances of the family these words must be narrowed. This attempt to narrow the meaning of express words is a dangerous attempt in cases where the intention is the clearest; but here it does not by any means appear clear to me. It is said that it appears from Earl John's will that he considered the term as then existing; but the question is, how the present Earl Gower and the parties claiming under his marriage settlement considered it. No doubt but that every person claiming under a marriage settlement is a purchaser for a valuable consideration. Then a distinction has been taken as to the interest of this money during the life of the present Earl in respect of his having joined Earl John in the covenant. But there seems no foundation for that distinction, for the present Earl must be considered in two lights, as cove-

nantor and as covenantee. To be sure he was a covenantor as joining in suffering a recovery, and making that covenant, and if he had joined in any other former act affecting the said premises he would have been liable in the character of covenantor; but he is also, as far as his interest goes in the marriage settlement, a purchaser under it, and consequently a covenantee; and his trustees, in case of breach of covenant, have a right to bring actions for his benefit: the present Earl is therefore in just the same light as his eldest son would be, if he were dead. I have no doubt on the question, that the plaintiff is not entitled.

Gower v *Gower.*

Lord Commissioner *Hotham* agreed.

HEAD *versus* LORD TEYNHAM.

In Linc. Inn-Hall, Dec. 1783.

Bill to carry the trusts of a will into execution whereby, amongst other things, lands were limited to trustees for a term of 500 years to raise 4000*l.* for younger children's portions. There being six younger children entitled under this limitation to have the 4000*l.* two of them assigned their shares of the 4000*l.* to a trustee for the benefit of two other of the children. And the only question was, whether it was necessary that this trustee should be a party to this suit. For plaintiff it was insisted that as the original trustees of the term who had the legal estate, and all the children who had the beneficial interest were before the court, there was no occasion to make the other trustee a party, and the court would direct a sale of the term without his joining in the sale: and of that opinion was the court—and decreed accordingly.

If the trustees of a term and the *cestui que trust* are before the court, an intermediate trustee of the equitable interest need not be party to a bill filed to carry the trusts of the term into execution.

Nelson v Seaman 1 D. F. & S. 372.

DURANT *versus* DURANT.

In Linc. Inn-Hall, Dec. 1783. *Lords Commissioners.*

Plaintiffs file a bill to compel the execution of a settlement which was prepared, but never executed, by reason of the death of one of the parties. On the hearing it appeared that the settlement so prepared, differed materially from the articles on which it was founded to the prejudice of the plaintiffs. The court will direct a settlement according to the *articles*, notwithstanding the plaintiffs do not pray relief so beneficial to themselves.

On the marriage of Mr. and Mrs. Durant articles were entered into whereby Mrs. Durant's father agreed to settle 5000*l.* on Mrs. Durant for her life, and to go after her death equally amongst the children of the marriage. Sometime after the marriage a settlement was prepared; but instead of pursuing the articles, the 5000*l.* was so settled that Mrs. Durant had no interest therein whatsoever, and the children took it only on the contingency of their arriving at the age of 21. This settlement was prepared when Mr. Durant was very ill, and he died without executing it. There being but one child (who was a daughter), the mother and daughter brought the present bill to carry the settlement into execution. But it being manifestly against the justice of the case that the settlement should be carried into execution which varied so materially from the articles, the court for sometime doubted whether, as the mother and daughter had joined in this suit to their own prejudice, they could decree the articles to be carried into execution in direct contradiction to the specific prayer of the bill. And Lord *Loughborough* asked *Mr. Ambler* his advice as being quite a new case. But after some consideration the court decreed the articles to be carried into execution.

MISENOR *versus* BURFOOT.

In Linc. Inn-Hall, Dec. 17. 1783. *Lords Commissioners.*

A bill prays that a defendant may either admit assets, or that an account

Bill brought by a legatee against executors charging them with assets, and praying that they might either admit assets, or that an account might be taken of testator's personal estate, &c. but not specifically requiring them to set forth such account by their answer. Defendants by their answer did not admit assets, but said generally that

they were ready to account. Plaintiff excepted to their answer, for that they had not set forth an account of testator's personal estate and effects, &c. and the Master allowed the exception. Defendant excepted to the Master's report; and it was insisted on the part of the plaintiff by *Solicitor-General* that a defendant is bound to answer every part of the bill, without being particularly required, and that formerly the interrogating part of a bill was very short, if any.

But the court thought the Master ought not to have allowed the exception, and directed him to review his report.

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may be taken of the testator's personal estate, &c. but does not require the defendant to set forth such account. It was determined that according the present practice he was not bound so to do; but a submission to account is sufficient.

HOWLAND *versus* NORRIS.

Et e Contrà.

Lord Chancellor.
In Linc. Inn. Hall,
Feb. 18, 1784.

This was a bill to compel a specific performance of an agreement, under the following circumstances:

James Adams by his will, dated the 15th of Sept. 1774, devised his real estates to the plaintiffs Howland and another, in trust, to sell the same and apply the produce in manner therein mentioned. In October 1775 the testator died, and on the 30th day of May 1776 the estates were sold by public auction, when Richard Norris became the purchaser of two lots, on the behalf of the defendant Earl Stanhope, at the sum of 6240*l.* and paid down 312*l.* as a deposit. By the conditions of sale the purchases were to be completed and the estates conveyed on or before the 29th day of September following. In the same year a suit was instituted in this court to carry the trusts of the testator's will into execution, which took notice of a contract having been made with the defendants for the sale of the said premises, although they were not made parties; and on 18th Dec. 1777 a decree was made in that cause, when it was referred to the Master (amongst other things)

A contract having been made for sale of an estate, it afterwards appeared that there were several outgoings from the estate, which were not disclosed at the time of the contract; yet these being matters which lie in compensation, the contract shall be carried into execution, with an allowance only to the purchaser for these particulars which

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diminish the value. The agreement not being completed within the time specified, the purchaser shall be allowed interest for such time as the purchase money shall appear to have been kept dead, for the special purpose of completing the contract.

to inquire whether any contract had been made for the sale of the said real estates, and whether the same was proper to be carried into execution, and if so, then that the same should be executed accordingly. By a separate report made the 29th July 1779, the Master reported that the above-mentioned contract had been entered into, and that the same was proper to be carried into execution. In this situation of things Richard Norris died. The present bill was brought against the representatives of Norris and against Earl Stanhope, and prayed the said contract might be carried into execution.

The defendant Earl Stanhope, by his answer, made several objections to completing the purchase; that by the printed particular of the estate at the time of the sale the estate was described to be tythe-free, whereas it now appeared to be liable (together with some other lands) to the payment of a sum of 14*l.* per annum, that by the printed particular it was represented in general terms that the purchaser would have an unlimited right of common, whereas it appeared that the right of common was confined to sheep only; that one farm (part of the premises contracted for) was by the particular described to be let at 150*l.* per ann. which the plaintiffs had since the time of the sale let at 127*l.* per annum. The defendant also stated some other smaller circumstances in depreciation of the said premises. He also insisted that there had been much unnecessary delay on the part of the plaintiffs; and that he, the defendant, had been forced to keep the purchase money dead in his banker's hands; that upon these several grounds of objection he ought not be compelled to execute the contract; but if the court should be of opinion it ought to be carried into execution, he claimed to be entitled to an allowance out of the purchase money in respect of the said payment in lieu of tythes, and of the other matters above-mentioned, and also for the interest of the purchase money, during the time he kept it by him for the purpose aforesaid.

The cross bill stated these facts, and prayed the agreement might be cancelled, or set aside.

For the plaintiffs, in the original bill, it was insisted that the defendant ought still to execute the agreement, upon having what should appear to be a proper allowance made to him in respect of the several matters insisted upon by him.

For the defendant it was said, these were such material variations in the subject matter contracted for, as would vitiate the contract altogether; that the main ground upon which this court went in compelling specific performances instead of leaving the party to his remedy at law was, that it was against equity and good conscience to compel him to take any thing in lieu of the specific thing contracted for.

Lord Chancellor.—To be sure if this case came before me as a new one, I should think it would require a great deal of consideration indeed, before I compelled the defendant to go on with this agreement; for if there be any material difference between the real subject of the contract and what the party supposed he was contracting for, such as the party may fairly and conscientiously be supposed to have relied upon in the purchase, he ought in justice to be discharged from it. But it would now overturn a great many cases. I remember a case where a man purchased an estate, part of which was a wharf, and where the wharf appeared to be the whole object of his making the purchase; yet, the vendor not being able to make out a title to the wharf, the court made him take the estate without it. There are fifty cases which go farther than the present, where the court has made the party accept of a compensation; and however these cases were first established, it is now settled that wherever it is possible to compensate the purchaser for any article which diminshes the value of the subject matter, he must be satisfied with such compensation; or to speak in the usual terms, wherever the matter lies in compensation: but I cannot lay down this rule as universal, for a case may be so circumstanced that the party may have purchased purely for the sake of the very particular wanting. The case of the wharf was nearly this: and if I had been to have judged of that case, and if it had

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appeared that the purchaser was in a trade, in which that wharf was essentially useful, and that he made his purchase for the sake of his trade, I should not have thought that it interfered with the general rule, if I had discharged him from his contract; and other cases may be put of a similar nature; but wherever the general doctrine will apply, the remedy must lie in compensation.

His Lordship referred it to the Master to inquire whether the sum of 5928*l.* residue of the said purchase money had been for any and what period of time set apart by Lord Stanhope to answer the purchase, and in contemplation of such purchase being completed; and also to inquire what compensation ought to be made to Lord Stanhope for the several particulars mentioned by him in his answer. *Reg. Lib. A.* 1783, *fol.* 337.

In Linc. Inn-Hall, Feb. 20, 1784.

JEFFERY *versus* SPRIGGE.

A limitation by will of personal estate after the death of N. S. without lawful issue is too remote and void.

Nathan Sprigge having by his will given all his real and the residue of his personal estate to Nathan Sprigge Jeffery, his heirs, executors, and administrators, afterward made a codicil, thereto as follows:—"Whereas I have in and by my said will given, devised, and bequeathed all the rest and residue of my real and personal estates of what nature or kind soever, unto Nathan Sprigge Jeffery, his heirs, executors, and administrators: Now I do hereby declare my will, intent, and meaning to be, that in the case of the decease of the said Nathan Sprigge Jeffery before he attains the age of 21 years, or in case of his decease at any time after his said age of 21 years without lawful issue, then I give, devise, and bequeath all the said rest and residue of my said real and personal estate to Richard Morland and Edmund Norris in my said will named, their heirs and executors, and the survivor of them upon trust, that they my said trustees, and the survivor of them, his heirs and executors, do and shall

as soon as conveniently may be, after the decease of the said Nathan Sprigge Jeffery without lawful issue as aforesaid, sell and dispose of all my real estates; and my will and meaning is, that on receipt of such purchase money by my said trustees, they shall and do pay, apply, and dispose thereof, together with the rest and residue of my said personal estate, to and amongst all the next of kin of my late uncle Nathan Sprigge."

The only question was, whether the limitation of the personal estate by the codicil to the next of kin of testator's uncle was good or not? Nathan Sprigge Jeffery died without issue, having first attained his age of 21.

Lord Chancellor.—I am entirely of opinion in this case with the plaintiff. The words of the will import that all is given to Nathan Sprigge Jeffery; but then the codicil says, "in case of the decease," &c. Whatever may be the difference which has been made in the cases cited between real and personal property, yet in this case the personal must follow the real estate; for from the words of the codicil they must necessarily go together. Therefore, first, as to the real estate: none of the cases of springing uses establish that a limitation of real property on a dying without lawful issue has been considered as a contingent or springing use; for if you can establish it as a remainder, it must take place as such, and shall never take effect as an executory devise. Nor do I know that this construction disappoints the testator's intention. I rather think he meant the remainder persons to take whenever there should be a failure of issue of the first taker. Whatever may be the sense in which these words may strike persons who are no lawyers, we must consider them as lawyers; and it is now too late to contend against the rule. These words have now got a technical meaning, and none of the ingredients which have turned the other cases round (which I never liked) have occurred in this. The decree must be therefore according to the prayer of the bill.

In Lincoln's Inn Hall. Mr. Justice Buller in absence of Lord Thurlow. Feb. 23, 1784.

LOWTHER *versus* EARL OF WESTMORELAND.

William Lowther, Esq. and Lady Augusta his wife, heretofore Lady Augusta Fane, daughter of late Earl of Westmoreland, by Lady Burghersh, Plaintiffs.

The present Earl of Westmoreland, Thomas Fane and Trustees, Defendants.

On Marriage, the husband executes a deed poll whereby he purports to settle all his real and personal estate on the wife and the heirs of her body by him begotten, obliging her to give each of her children by him begotten 1000*l.* apiece at 21, and to divide the residue equally amongst them at her death. This gives an estate for life only to the wife, with remainder in fee to the children as tenants in common.

These marriage articles so far tied up the property of the settlor, that a real estate purchased by him in his life time with part of his personal estate, shall be considered as personal estate

Lord Montague Bertie being seized and possessed of freehold, copyhold, and leasehold and other personal estate previously to his marriage with Elizabeth Piers, executed a deed poll, bearing date 16 April 1735, in the following words: "Whereas a marriage is intended and will shortly be concluded between Montague Bertie, Esq. of St. James's Westminster (commonly called Lord Montague Bertie) and Miss Elizabeth Piers of St. Margaret's, Westminster; Know all men by these presents in case the said marriage takes effect, that I the said Lord Montague Bertie do hereby settle all the lands, tenements and hereditaments, goods and chattels whatsoever to me now belonging or that shall or may hereafter belong to me, upon her the said Elizabeth Piers (in case she survive me) and upon the heirs of her body by me lawfully to be begotten, *obliging* her to pay to each of her children by me begotten as aforesaid, so soon as he, she, or they, attain the age of 21 years the sum of 1000*l.* and the remainder of all I die possessed of equally at her death to divide among her children by me begotten as aforesaid." Lord Montague Bertie had two daughters by that marriage, Augusta (mother of plaintiff, Lady Augusta) and Frances. He afterwards made his will, whereby he recited the deed poll verbatim, and thereby ratified and confirmed the same; and for the better effecting the purposes aforesaid, he thereby gave and devised all his real and personal estates to trustees upon the trusts therein mentioned; but the will being very long and complicated, and clearly not a proper execution of the agreement contained in the deed

poll; the will was not relied upon. On the 25th August 1749, he made a codicil, whereby after reciting that some estates both real and personal, had devolved upon him by virtue of the last will and testament of his brother Lord Thomas Bertie, he thereby gave such estates upon the same trusts as those in his will. In February 1750, Lord Montague Bertie laid out part of his personal estate to the amount of 5000*l.* in purchase of the manor of Roscarrock in the county of Cornwall, which was conveyed to him in fee. Lord Montague Bertie died 12 December 1753. In 1758, and previous to the marriage of Augusta with Lord Burghersh, Augusta by deeds of lease and release and a common recovery settled her moiety of the manor of Roscarrock in strict settlement. There were issue of that marriage the defendants, the present Earl of Westmoreland, and Thomas Fane, and plaintiff Lady Augusta. Lord Burghersh by his will gave all the residue of his real and personal estate to the present Lord Westmoreland. Frances Bertie, the other daughter of Lord Montague Bertie, by her will, after giving some legacies, gave all the residue of her personal estate to her mother, Lady Elizabeth Bertie. Lady Elizabeth Bertie died in 1781 intestate, leaving the present Earl of Westmoreland, Thomas Fane, and plaintiff Lady Augusta, her grandchildren and next of kin and said Earl heir at law. Plaintiff, Lady Augusta, having married plaintiff William Lowther, the present bill was brought praying that the deed poll might be established, and the wills of the said Lord Montague Bertie and Frances Bertie may be declared to be well proved, and the rights of the several parties ascertained.

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and be disposed of accordingly.

Two questions were made in this cause: First, whether Lady Elizabeth Bertie, the wife, took an estate tail under the deed poll, or whether the children of the marriage took any, and what estate and interest as purchasers in the real estate (for it seemed agreed that this point would determine the property in the personal estate). Second, whether the manor of Roscarrock, which was purchased by Lord Montague Bertie after the execution of the deed poll, should go according to the disposition of the real or of the personal

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estate of Lord Montague Bertie. As to the first Mr. Serjeant *Hill* and *Spranger* for plaintiffs, contended that it was an estate tail in Lady Elizabeth Bertie. This is not the common case of marriage articles where the estates are given to the husband and the heirs of his body. Here real and personal are agreed to be settled together, and it comes exactly within Lord *Hardwicke's* determination in *Green* v. *Eakins*, 2 *Atks.* 474, and may be compared (as that case was) to a settlement of lands whereby wife takes an estate *ex provisione viri*, where this court never interferes to settle the estate otheswise, because the statute of *Hen.* 7 prevents her barring the issue; and the subsequent part of the deed poll obliging her to pay the sum of 1000*l.* to each of the children, confirms this construction, as it shews she was to take such an estate as might enable her to pay such sums, or if this deed poll is to be considered as a covenant to stand seized to uses, it will come to the same thing, for then the use will be executed by statute.

Attorney General and *Scott* for Lord Westmoreland, in the same interest as plaintiff's as to the construction of the deed poll, also contended as to second, that the manor of Roscarrock must go as the other real estates went, although it was purchased with the personal estate of Lord Montague Bertie subsequent to the deed poll, for it never can be contended that Lord Montague Bertie meant to deprive himself of the dominion over his personal estate in his lifetime: that construction would go to the extent of not allowing him the use of a single guinea; it only binds him not to dispose of any part of his personal estate elsewhere at his death.

On the other side it was contended, that this court in the execution of marriage articles would never give the absolute property to a parent: here the wife should take an estate for life with remainder to children in common, either in fee or in tail with cross remainders, which this court frequently orders, without express words to raise them, as in *West* v. *Erisey*. That the word "children" in the latter part of the deed poll explains what the settlor meant by the words "heirs of the body" in the former, and that must

controul the former part. The obliging her to pay the sums of 1000*l.* to each of the children, operates merely as a charge upon the estate, and cannot be considered as explaining what estate the settlor meant to give to the wife. As to second point; the Roscarrock estate must go with the personal estate; for Lord Montague Bertie had no power over his personal estate after the deed poll. By the same rule he might have squandered every guinea. As he thought fit to tie it up, he could not afterwards dispose of it.

Mr. Justice *Buller*.—The words of the instrument upon which these questions arise are very inaccurate, but they are only to be considered as articles or hints of intention of the party, and as such to be construed, and the court is therefore in cases of this kind at liberty to transpose or mould words according to what appears to be the intention. There are some established rules of this court upon which it will be necessary to go in this case. First, I take it to be established, that where legal technical words *only* are used, they must have their legal technical meaning, but if there are any other words in the will which shew the meaning of the party to be otherwise, then the whole shall be construed according to such apparent intention.

Another rule is, that every word shall have effect given to it if it possibly can: proceeding therefore upon these rules, it is material to state the articles and to see the effect of all the words taken together [states the deed]. The principal part of the argument has been upon the first part of the deed; now had it stopped there, to be sure the wife must have taken an estate tail; but he then goes on to oblige her to divide the remainder *equally* amongst the children; this is so expressed in the deed: now is there any other construction that will make the whole consistent? I think there is; she shall take an estate for life, and after her death it shall go equally amongst all her children, and the court is not then at liberty to say that the whole shall go to the eldest son; if so, the children took an estate in fee in the real as tenants in common and the absolute property in the personal after wife's death. This is my opinion upon the case in general, but there was one part of it which must be

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particularly considered, which is as to the real estate purchased after the articles, whether that must be considered as real or personal At the time of making the articles there was no provision made to empower the husband to change the money into land, or the land into money, and then the court cannot imply it. This part therefore must be considered as personal estate.

In Lincoln's Inn Hall, Lord Chancellor. Feb. 24, 1784.

SINGLETON *versus* GILBERT.

Mary Susanna Singleton, only child of defendant Francis Singleton a bankrupt, by Susanna his late wife, who was one of the children of Thomas Gilbert deceased. Plaintiff.

Richard Gilbert, and John Villiers, trustees in marriage settlement of plaintiffs father and mother; Francis Singleton and others, Defendants.

E. S. devised all her real estate to trustees for a term of 800 years to raise 200*l.* for the purposes in the will mentioned, and after the determination of that term and subject thereto to other trustees for a term of 1000 years in trust, to pay out of the rents certain annuities and *subject to the said two terms*, she gave the premises to all and every the child and children of her brother T. G. and the heirs of their bodies &c. T G. had two children

By marriage articles made previous to marriage of plaintiff's father and mother dated the 5th June 1776, reciting that Susanna Gilbert, plaintiff's mother, was entitled under the will of Richard Gilbert her uncle to certain estates and interests in remainder as therein mentioned, and reciting, that the said Susanna was also entitled under the will of Elizabeth Palmer, deceased, to an estate tail to herself and the heirs of her body, in a fourth or some other undivided part of certain freehold lands, of which said Elizabeth Palmer died seized, and would also be entitled under her said will to a fourth or some other part of the residue of her personal estate, and also of the rents of her said freehold estate, which for several years then last past had been received by the trustees named in the will of said Elizabeth Palmer, and were then accumulated in their hands; and reciting that in prospect of the said marriage, it had been agreed that in case the said marriage took effect, all the said monies and other interests of a personal nature in which the said Susanna by any of the means before recited should become entitled upon or in consequence of the said marriage, or upon her attaining 21 years, should be taken and possessed by said Francis Singleton for his own use when

Mainwaring v. Beavor 2 Vern 467.
Vickers v. Scattlers 10 Ves. J. 267

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the same should become payable, and that in the mean time from and after the solemnization of the said marriage all the said monies and premises should be vested interests in the said Francis Singleton, and be transmissible to his personal representatives, if same might so become vested in law, and that the undivided shares of all the freehold estates aforesaid to which the said Susanna might become entitled upon or in consequence of her said marriage, or upon her attaining the age of 21 years, or which might devolve to her at any time during her coverture, should immediately after the solemnization of the said marriage or as soon as the rules of law would allow, be conveyed and assured to and to the use of the said Francis Singleton, his heirs and assigns, in fee simple, or as they should direct; and in consideration of said agreement, and for making provision for said Susanna, and any issue of said marriage, the said Francis Singleton agreed within six months after the marriage to pay 1500*l.* to Richard Gilbert and John Villiers upon the trusts therein after mentioned, and that for securing payment thereof, the said Francis Singleton had confessed a judgment for that sum. It was witnessed that he the said Francis Singleton should within six months pay to the said trustees the said sum of 1500*l.* on trust to apply the same to the uses of the marriage as therein mentioned.

at the death of the testatrix, and one born, afterwards, but before the death of the annuitants. This is an immediate devise, and the last mentioned child being born after the testatrix's death, is not entitled to any share of the premises.

Elizabeth Palmer, by her will dated the 11 June 1757, gave all her real estates to trustees for a term of 500 years upon certain trusts therein expressed; and after the determination of that term and subject thereto, she gave all her said estates to other trustees for a term of 1000 years upon trust to pay out of the rents and profits of said estates, the interest of 200*l.* to be borrowed under the said term for 500 years, and to pay unto Francis Palmer an annuity of 16*l.* and to two other persons annuities of 6*l.* each for their lives, and subject to said two terms she gave all the said estates and premises to all and every the child and children of her brother Thomas Gilbert, and to the heirs of the body and bodies of such child or children issuing; such children, if more than one, to take in equal shares and proportions as tenants in common; and in case of the failure of issue of the body

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or bodies of any such child or children, then as to the part or share of such child or children whose issue should so fail, to all and every the remaining child or children of the said Thomas Gilbert, and to the heirs of the body or bodies of all and every such child and children if more than one, to take as tenants in common; and in failure of issue, to her brother Richard Gilbert for life, with divers remainders over.

And she thereby directed that the said trustees of the 500 years term should raise 200*l.* under the said term, and should stand possessed thereof, in trust for better securing payment of her debts, legacies, and funeral expenses and annuities, and of what should remain thereof after answering those purposes, and also of what should arise from the clear residue of the rents and profits of her real estates received by them, or also from the residue of her personal estate; and she directed, that the same should by her said trustees be placed out at interest, and after the death of the several annuitants be applied in discharge of the said 200*l.* so borrowed, and after payment thereof, then that the said trustees should stand possessed of said monies and personal estate, and all securities, stock, and annuities whereof the same should then consist, as should remain undisposed of, and all interest due for the same, in trust for all and every the child and children of said Thomas Gilbert, who should live to attain the age of 21 years, their executors, administrators, and assigns, in equal shares and proportions.

Elizabeth Palmer at her death was possessed of a real estate of the value of 50*l.* per annum and of a small personal estate which was not sufficient to pay her funeral expenses, debts, and legacies. The surviving annuitant under the will of Elizabeth Palmer died 19 March 1764.

Thomas Gilbert had issue Richard Gilbert, born in 1754, Elizabeth in 1755, Susanna, plaintiff's mother, 11 December 1757, and Thomas in 1761, and Edward (who is since dead) in 1764.

Susanna, plaintiff's mother, died in 1778, under the age of 21, and no conveyance whatever was ever made to Francis Singleton of any part of what Susanna claimed under the

will of Elizabeth Palmer or of her great uncle Richard Gilbert.

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The present bill prayed the right of plaintiff to one fourth part of the real estates of Elizabeth Palmer, as tenant in tail, might be declared, as also her right to one fourth part of the arrears of rent arising from the said fourth part, and that defendant Francis Singleton might be decreed specifically to perform the agreement entered into by him before his marriage, and pay said sum of 15,000*l.* to be placed out on the trusts aforesaid, or that the said Richard Gilbert and John Villiers might be directed to put the said judgment in force against the said Francis Singleton and take out execution thereon.

There were two questions made by the pleadings; First, (which was not much argued by the counsel) whether as Singleton had agreed to settle the 1500*l.* in consideration of his wife's expected fortune being made over absolutely to him, and as he had never received any part thereof, his estate should be liable to pay the 1500*l.*

But secondly, the question principally argued in the cause was, whether the plaintiff's mother could take under the will of Elizabeth Palmer, as being born after the testatrix's death. Plaintiff insisted that her mother was entitled equally with the children born before, for the devise was to be considered as vesting at the time when the trusts of the terms were satisfied, and consequently vested in all such children of Thomas Gilbert as were then alive. All the trusts of the terms were at an end, at the time of the death of the surviving annuitant (which was in the year 1764) and not before; and plaintiff's mother being then alive, she therefore took one fourth part thereof. Defendant Richard and Elizabeth Gilbert insisted that they were entitled in moieties to all that was devised by Elizabeth Palmer's will, as being the only children of Thomas Gilbert alive at the time of testatrix's death, which must be considered as the real time of the devise vesting.

Lord Chancellor, as to the second point, said, the general principle is, that where the legacy is given to all the children, it shall not extend to after-born children; but

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where it is given with any suspension of the time, so as to make the gift take place either by a fair, or even by a strained construction (for so far some of the cases go) at a future period, then such children shall take as are living at that period; and from observation of the cases on this subject it appears, that small circumstances have made the difference; but in this case I can see no circumstance to take it out of the general rule. It is an estate given directly, although given charged with the terms, and therefore I cannot consider the after-born children as entitled. As to the first point the *Lord Chancellor* directed an account to be taken of what plaintiff's mother was entitled to, under the will of her uncle Richard Gilbert, and declared that if it exceeded 1500*l.* he should direct it to be paid to the assignees; if less than 1500*l.* that trustees should prove the deficiency as a debt under the commission.

In Lincoln's Inn Hall. Lord Chancellor. Feb. 24th 1784.

WILLIAMS *versus* DUKE OF BOLTON.

ON EXCEPTIONS.

B. was tenant for life with remainder to his first and other sons, in tail, remainder to O. for life, remainder to her first and other sons in tail with other contingent remainders with remainder to B. in fee. O. had a child who died almost immediately. Before any other contingent remainder Man

On the hearing of this exception, the Registrar did not understand the *Lord Chancellor* to have given a final opinion, and had taken no minutes; it therefore stood for judgment in the paper this day.

Lord Chancellor.—I have not the particular circumstances of the case now in my head; but the general ground, upon which I intended to go when I made the order, was this: The duke was tenant for life, (not without impeachment of waste) with contingent remainders to his own children, with remainder to Miss Pawlett (afterwards Mrs. Orde) for life, with remainder to her first and other sons in tail with remainder to the Duke in fee. The Duke being seized for life, and also of a vested remainder in fee, while the contingent estates were in expectancy, cut down timber, and the question is, to whom the timber shall belong. If any other person entitled in remainder to

Washington v. Boddens 15 Beav. 3.
Bagot v. Bagot 32 Beav. 512.
Birkbeck v. Bird 9 Eq. 690

Williams v. Bolton.

an estate of inherience had been in being at the time, the law would have thrown the timber on that remainder; but I was of opinion, that although the Duke had a vested remainder, yet as it was not competent for him to cut down the timber in respect of his life estate, he could not take advantage, in respect of his estate in remainder, of his own wrong. I thought if the case had been so shaped in the pleadings, it would have been a fraud on the settlement (especially considering the express words of the settlement). If he then was not entitled to the timber, the question was, who should be? Mr. Orde had had a son born, who died soon afterwards; the father administred to him, and it was argued, that the timber belonged to his son (and consequently to his father as his administrator) by a sort of analogy to what would have been the case if the timber had been cut down during that estate tail. My opinion was, that it did not belong to him by the operation of the law; and I did not see any rule of equity to bring him *quasi* within that situation. My opinion was that the fund would be part of the estate tail: another son is born of Mrs. Orde, does it belong to him? I think at present, no. He takes an estate tail, always subject to be divested by a subsequent estate of a child of the Duke's coming into being. The timber is part of the realty; by an accident (as to all but the Duke, and him therefore I bar) it is severed from the realty, and becomes in its nature personalty, but yet bound as far as it can to the uses of the realty. In this I follow the rule laid down in a case which was much contested, that of *Pelham* and *Gregory*. The Duke may now have sons; if so, there is no estate but what is subject to be divested, for though the remainder vests, it vests only in expectancy, and is liable by the rules of law to other uses springing to the prejudice of such expectancy. The master must therefore take an account of the timber, and compute interest at 4*l.* per cent. The money to be paid into the bank to the credit of the cause, and subject to further order; and any person to be at liberty to apply to the court. I do not at present see the person to whom I can give it, but if any think they have a right, they must

came in esse, B. cut down timber, his own remainder in fee being the next existent estate of inheritance, but afterwards O. had another child B shall not take advantage of his own wrong by taking the timber so cut, nor is the second child of O. entitled until it shall be seen whether, B. shall have a child, but the produce shall be paid into Court by B. with interest at 4 per cent., and accumulate for the benefit of such person as shall appear at the death of B. to have title to it.

Williams v. Belton.

apply. I do not think there ought to be any costs given.

His Lordship directed that the Duke should pay into the bank to the credit of the cause, the sum of 2943*l.*, for which the timber had been sold, and ordered that the master should inquire into and ascertain the time at which the said sum or any part thereof was received by the Duke, and should compute interest thereon at 4 per cent. from such times respectively, and that the Duke should pay into court in like manner what should be found to be the amount of such interest, and that such principal and interest should be laid out, with liberty for any person interested to apply. *Reg. Lib. B.* 1783. *fol.* 326.

In Court. Lord Chancellor. May 5, 1784

WADE *versus* PAGET.

For Case and Arguments, vide 1 *Brown Cha. Ca.* 364.

Lord Chancellor.—It is perfectly clear, that one moiety of the lands in Pilton must go to Mrs. Paget, as heir *ex parte maternâ*, for wherever the fee simple in law and equity exist in the same person, there will be a merger of the equitable interest in the legal. If this question had turned upon the circumstance of intention in Elizabeth Moore Slade, it might have been otherwise; but this is out of the case, as she being an infant was incapable of intention. But here I go upon the ground of its being a strict legal right which this court cannot take away; with respect to the other moiety of the lands in Pilton, the case is different: Moore covenanted to convey what he had not power of conveying: there is no possibility of a specific performance, it is merely a matter of damages; I must therefore direct an issue to ascertain the amount of the damages, and they must fall on Moore's personal estate, and must be paid to plaintiffs; for this is different from the general case of covenanting to settle lands to be purchased, in which case I should direct

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the money to be laid out in purchase of land, but here there is a defect in settling a specific estate, which therefore must rest entirely in damage. With regard to the West Pennard lands, I am perfectly clear from all the cases, that I must consider this a case fit and proper to be supplied by this court.

It was afterwards considered whether the damages to be recovered should be considered as real or personal estate, and go to the heirs or the personal representative of Elizabeth Moore Slade.

Lord Chancellor.—The money to be recovered as damages must be laid out as if Elizabeth Moore Slade had received it herself, and this court would not have directed it to be laid out in land, but would have given it her in money, and therefore the damages must be considered as personal estate, and must belong to the estate of her father as her representative.

MOLESWORTH *versus* MOLESWORTH.

In Court. May 1, 1784.

A court of equity will not supply words in a will, unless there be palpably *error scribentis.*

Walter Molesworth made his will dated the 29th December 1772 as follows. After the introductory part, "I now proceed to dispose of the whole of my estate both real and personal," he then gave the whole thereof to trustees upon the trusts therein after mentioned. And after giving some particular directions about some part, he gave the bulk of it to the children of his nephew, Robert Molesworth, "exclusive of the interest of 4000*l.* consolidated 4 per cent. annuities of which one half shall be regularly paid to the order of the said Robert Molesworth, or should he happen to die before his present wife 60*l.* per annum to his said wife during her life and for the better maintenance and education of his said children, and should a sum of money be requisite to advance any of them in the world when of proper age, my trustees are hereby impowered and entreated to use their discretion in making the necessary inquiries and applying such part of the principal stock as

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shall not exceed the equal portion to such child then living." There were no stops whatever in this will. And on a bill filed to settle the rights of the parties, Robert Molesworth the father insisted that it was was the intention of the testator to give him the one half of the interest of the 4000*l.* consolidated 4 per cent. annuities for his own use, and the other half for the maintenance of his children; that as the devise stood at present, only one half was disposed of, but the supplying a few words would make the devise clear as to the whole. The words which he wanted to have supplied were these after, "or should he happen to die before his present wife, 60*l.* per annum to his said wife and" to insert "the other half." When the cause was originally heard before Lord *Bathurst*, he had refused to supply these words, and considered the children as entitled to the whole; on this point the present rehearing came on.

Price, *Scott*, and *Bicknell* for petitioner, insisted that this appeared to be the intention of the testator, and to prove that this court would supply words to effectuate the intention, they cited, 2 *Vent.* 213. *Kentish* v. *Newman*, 1 *Wms.* 234. *Newland* v. *Shepherd*, 2 *Wms.* 194. and *Swinburne Part. VII. sect.* 12, *fol.* 477 in octavo.

Lord Chancellor.—I have no doubt in this case; the testator has checked the general fund by taking some interest out of it: if it had rested merely on what was given to the husband, it would have been plain, but it goes on to give 60*l.* per annum to the wife, and some words which are added to that part have made all the puzzle. The question is whether the moiety of the interest shall be charged with the maintenance of the children, but I think it will be too much to supply these words. If the husband should die or be unable to maintain them, the court would give them a proper maintenance without adverting to the words of the will, and would educate them out of their own fortune. To be sure the case of *Newland* v. *Shepherd* is a very strong one, but this does not come near it. I could wish this case came within the idea of *error scribentis*, but here is a gift of the whole fund to the children unchecked as to one moiety. I

therefore can see no reason to alter the decree. If the father prefers a petition upon the score of inability, he may perhaps be allowed maintenance.

Molesworth v. Molesworth.

CAVENDISH *versus* CAVENDISH.

In Court. Lord Chancellor. May 7, 1784.

Diamonds and pearls made up for wear will not pass by a devise of a cabinet or collection of curiosities, consisting of coins, medals, *gems, and orientalstones*, and other valuable things. "Valuable things" must mean things *ejusdem generis*.

Lady Elizabeth Cavendish by her will, dated 26 Jan. 1778, devised her house in Piccadilly to A. B. with several limitations over, and then bequeathed as follows:—"I give all my collection of gems, medals, and curiosities, together with the cabinet in which the same are usually kept, except such part thereof as I shall herein after, or by any codicil afterwards dispose of, to Lord Charles Cavendish, his executors, administrators, and assigns, upon trust to permit and suffer the same to be held and enjoyed by the person who shall be entitled to my said house in Piccadilly." And she then bequeathed several diamond rings and snuff-boxes to different persons.

She afterwards made a codicil, dated the 31 Jan. 1779, and thereby gave her house in Piccadilly to D. L. absolutely; and then "I give all my collection, or cabinet of curiosities, consisting of coins, medals, gems, and oriental stones, and other valuable things, (except as I shall otherwise dispose of), hanging-shelves, snuff-boxes, bust on the stair-case of Cardinal Richlieu, my Florentine cabinet of oriental stones in the second room, and the Japan cabinet in the bed-chamber, formerly belonging to Lady Elizabeth Wentworth, my late aunt, unto Lord Charles Cavendish and Lord Camden, upon trust, to permit the same to be enjoyed by such person as shall be entitled to my estate at Latimer;" which estate she had before devised to several persons and their issue in strict settlement.

At the time of the death of the testatrix, there were a diamond solitaire, a pair of diamond ear-rings, a diamond bow-knot, a pearl necklace, and some other pearls in her bed-chamber and the closet adjoining, and which were of

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very considerable value. It was in proof in the cause that what she called her collection was not confined to one particular room, but consisted of many articles in different drawers and cabinets in different rooms; and that she used to shew the diamonds and pearls in question, together with other things, when she shewed her collection; but it was also in proof that she occasionally wore them.

The question was, whether these articles passed under the above bequest.

Lord Chancellor.—The words "other valuable things" must be considered things *ejusdem generis*. To be sure every article that is prepared for wear must be part of the testatrix's personal estate; or otherwise, you might as well say that guineas should pass under a devise of coins; and it is not proper to explain this will by conversations of the testatrix in her life-time: here the words stand in no need of explanation. If Mr. Pitt's diamond had been kept and shewn as a curiosity, without appearing to have been ever applied as an ornament of the person, it would certainly have passed under these words. The line is perfectly broad and clear, and it is, whether these articles were prepared for wear or not.

His Lordship referred it to the Master to inquire and state to the court the particular description and qualities of the diamond solitaire, &c. in question, and reserved all further directions.—*Reg. Lib. A.* 1783, *fol.* 730.

The Master found that the diamond solitaire, ear-rings, and bow-knot consisted of that description of diamonds known by the name of brilliants, and that the brilliant diamonds therein were of very different qualities, some being good, some indifferent, and some bad; but the large diamond bow was of great lustre and merit, and the central diamond remarkably fine; and he found that the pearls in question were not extraordinary, and had become yellow from age; that the necklace contained the best pearls, but at each end of the necklace were some beads; and he found that both the diamonds and pearls in question were made up for wear and as ornaments for the person; and

that the jewellers examined before him had said that they should therefore in common speech and among the trade call and describe both the diamonds and pearls by the name of jewels, and not by that of gems, or oriental stones; and that if they had been asked to look at a collection of gems and oriental stones, they should not expect to be brought to see such wearing ornaments as those in question; for that gems were generally understood to mean opaque stones, that commonly were found in and composed the cabinets of the curious; that nevertheless the diamonds in question were undoubtedly valuable things, and might perhaps be classed, without impropriety, under the denomination of oriental stones, although diamonds fashioned and set were usually called among the trade, jewels.

The cause came on again on the 8th July, 1785, for further directions on this report, when the *Lord Chancellor* dismissed the bill without costs.—*Reg. Lib. A.* 1784, *fol.* 641.

Hereupon a petition of re-hearing was preferred, which came on before his Honour the *Master* of the *Rolls*, sitting for the *Lord Chancellor*, who affirmed the former order.

SCOTT *versus* FENOULHETT.

In Court. May 8, 1784.

RE-HEARING.

Sir Andrew Chadwick by his will devised as follows:— "I give and bequeath to my old and very worthy friend (although some differences have happened between the families) Captain Compton, the sum of 500*l.* and the like sum to each of his daughters, if *both* or *either* of them shall survive Lady Chadwick."

Testator bequeathed 500*l.* to "each of the daughters of C. if *both* or *either* of them should survive D."

Captain Compton had at the time of making the will, and at the time of testator's death, three daughters, who all survived Lady Chadwick; and Lord *Bathurst*, on the original hearing of this cause, directed 500*l.* to be paid to each of the three.

At the date of the will and the death of the testator, C. had *three* daughters, all

Stirling v. Walkly, post. 28 Garvey v. Hibbert, 19 Ves. 125
Daniell v. Daniell 3 Beav. 339. Harrison v. H. 1 Ro. & M. 72
Yeats v. Yeats 16 Beav. 372. Hare v. Cartridge 13 Sim. 165

Scott v. Fenoulhett.

of whom survived D. The *three* daughters are entitled to 500*l.* each.

On the present re-hearing, it was insisted by the party entitled to the residue, that only two daughters were entitled to legacies, and that the third daughter lived at a great distance from the testator, whereas the other two lived very near him, which would account for his thinking of two only; and therefore prayed the Master might inquire where the several daughters lived, and whether they were acquainted with the testator, &c.

On the other hand, it was sworn in the answer of the daughter who lived at a distance, that the testator knew her.

Lord Chancellor.—I remember a case stronger than the present, where the legacy was directory, "I give legacies to the two daughters of my old friend," &c. There were three daughters, and the court directed the word "two" to be struck out, and the legacies to belong to all three. As to what is suggested in the present case about the third daughter living at a distance, as that point has not hitherto been raised, and the daughter has sworn in her answer that the testator knew her, it will be too much now to direct any inquiry for the sake of raising the point.

Decree must be affirmed.

In Court. Lord Chancellor, May 6, 1784.

BUCKWORTH *versus* BUCKWORTH.

RE-HEARING.

In order to entitle the father of an infant legatee to maintenance it is not necessary that he should be absolutely insolvent; but that he should not be in sufficient circumstances to maintain his child suitably to his expecta-

Peter Shakerley, by his will, devised all his real estates (subject to an annuity of 400*l.* to his daughter Elizabeth Buckworth for her life) to his executors, in trust for the first son of the body of the said Elizabeth Buckworth, and the heirs male of his body; remainder in trust for the second and other sons in tail; remainder for first and other daugthers in tail male; remainder for his own right heirs. And the said testator thereby authorized and empowered his said executors in the mean time until there should be a son or daughter of the said Elizabeth Buckworth who should attain 21, to manage and improve the

said premises for the benefit of such son or daughter, and to lease the said premises in manner therein mentioned, and to lend and place out at interest all or any part of the monies arising from the said estate and premises, and all other his personal estate not applied in payment of his debts, legacies, and funeral expenses, and to pay and assign over to such son or daughter of his said daughter as should first attain the age of 21, all such rent, interest, improvements, and produce as should arise from his said estate and monies, when such son or daughter should attain the age of 21.

Buckworth v. *Buckworth.*

tion, the court will not allow maintenance to a grandchild legatee out of a fund not vested.

Testator died leaving the said Elizabeth Buckworth his only child and heir. She had five children, three sons and two daughters; and on a bill brought to carry the trusts of this will into execution, it was prayed that a proper maintenance might be allowed for the eldest son out of the estate. [The personal estate amounted to about 40,000*l.*] The cause was heard before the *Lords Commissioners* in 1783, who refused to give any directions as to maintenance. On this point the cause was now re-heard. And *Madocks*, for petitioner, claimed an allowance by way of maintenance, chiefly on the authority of two MSS. cases, *Harding* v. *Dorien*, in Nov. 1773, and *Fendal* v. *Nash*. The case of *Butler* v. *Butler*, 3 *Atkins* 58, was also cited.

Lord Chancellor.—Where the question turns upon the ability of the father to maintain the child, the rule is not laid down upon the father's absolute insolvency only, but maintenance is given, when the father is not in such circumstances as not to be able to give the child such an education as is suitable to the fortune which he expects. But in this case the child will not be entitled unless he attains 21. If the rents, &c. were to vest in him ultimately at all events, it would be a different case. But as it is I cannot alter the decree. If it could be done at all, it should be done on petition; but I have great reluctance in making precedents of this kind.

In Court.
May 11, 1784.

ASTLEY *versus* EARL TANKERVILLE.

In what case the settled estate of wife shall be exonerated from the mortgage made by husband and wife, for use of husband out of husband's personal estates? Devise "*subject to mortgage*," *not* sufficient to exonerate personal estate.

By indenture, bearing date 23d October 1716, and made between Sir John Astley and Dame Mary his wife, of first part; Sir Robert Jenkinson, Baronet, and John Wallop, Esquire, of the second part; Robert Fenn, Esquire, and Leonard Piddocke, Gentleman, of the third part; the said Sir John Astley and Dame Mary his wife, covenanted with the said Sir Robert Jenkinson and John Wallop and their heirs to levy a fine of the manors of Abbey Foregate, of Longdon and Stockstow with the appurtenances (which were the wife's estates;) which fine was to ensure to the use of the said Sir John Astley and his assigns during his life, without impeachment of waste; remainder to Sir Robert Jenkinson and John Wallop to preserve contingent remainders; and after the decease of the said Sir John Astley, as to the mansion-house with the appurtenances, to the use of said Dame Mary Astley for her life; and as to the rest of the said premises, to the use and intent that the same Dame Mary Astley should receive thereout an annuity of 500*l.* during her life, and subject thereto, and to a term for raising younger children's portions, to the use of the first and other sons in tail, and in default of such issue to the use of all the daughters equally as tenant in common; and in default of such issue to the use of Sir John Astley, and Dame Mary, their heirs and assigns for ever; with a proviso, that it should be lawful for Sir John Astley and Dame Mary, by any deed or writing under their hands, &c. to alter, change, repeal, revoke, and make void all the uses and limitations therein before declared in all or any of the premises aforesaid, or any part thereof, and by the same or any other deed or deeds in writing, to limit and appoint such new uses, trusts, limitations, and terms of and in the same respectively, with or without power of recreation, as to the said Sir John Astley and Dame Mary should deem meet.—The fine was levied accordingly.

Some time afterwards Sir John Astley borrowed a sum of 3000*l.* of Robert Holden, and in order to secure the repayment thereof, by indentures bearing date 23d June 1725, made between Sir Robert and Dame Mary of one part, and Robert Holden of the other part, writing the indenture of 23d of October, 1716, and the levying of the fine, it was witnessed that in consideration of 3000*l.* to the said Sir John Astley, in hand paid by the said Robert Holden, they, the said Sir John Astley and Dame Mary, by virtue and in pursuance of the said power to them given and reserved by the said indenture, did revoke and make void all the uses, trusts, terms, and limitations in and by the said indenture declared concerning the manor of Longdon, and did thereby limit, appoint, and declare the said manor and premises to the said Robert Holden, his executors, administrators, and assigns for the term of 500 years, and from and after the expiration, or other sooner determination of the said term, and subject thereto, to and for such uses, intents, and purposes, as by the said indenture of 23d October, 1716, were limited and declared; and the said Sir Robert Astley and Dame Mary did thereby demise and lease to the said Robert Holden, his executors, administrators, and assigns the said manor and premises to hold the same unto the said Robert Holden, &c. during the said term of 500 years, with a proviso that if the said Sir John Astley, his heirs, executors, or administrators, or such other person or persons to whom the freehold and inheritance of the said manor and premises immediately expectant on the determination of the said term of 500 years should for the time being belong, should pay to the said Robert Holden, his executors, administrators, or assigns, the full sum of 3150*l.* at the time and in the manner therein mentioned, that then and from thenceforth the said *term of 500 years should cease, determine, and be void.* And *Sir John Astley* thereby covenanted, that he, his heirs, executors, administrators, or assigns, would pay the said sum of 3150*l.* to Robert Holden, his executors, administrators, or assigns, conformably to the terms of the said proviso. And there was in the said indenture a similar

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power of revocation and appointment of new uses (except as to the said term of 500 years thereby created) as in the deed of 1716. In 1734 Robert Holden called in the the said 3000*l.* and thereupon, by indenture bearing date 24th September 1734, between said Robert Holden of first part, Sir John Astley of second part, and John Cotes of third part, reciting the said two indentures, and that there was then due to Holden, for principal and interest, 3101*l.* 5*s.* it was witnessed that in consideration of that sum paid to Robert Holden by Sir John Astley in full for principal and interest on said security, he, the said Robert Holden, by the appointment of the said Sir John Astley, testified as therein mentioned, did assign over unto the said John Cotes all the said manor and premises, and all the estate and term of years of him the said Robert Holden then to come and unexpired, to hold the said manor and premises to him the said John Cotes, his executors, administrators, and assigns, for all the residue of the term of 500 years, in trust for such uses and purposes as Sir John Astley should by deed appoint, and for want of such appointment in trust for said Sir John Astley, and to attend upon the freehold and inheritance of the said premises; and a receipt for the money was indorsed thereon.

In 1747 Sir John Astley borrowed a sum of 3000*l.* of Sir Richard Hoare and Christopher Arnold, and by indentures dated the 12th May 1747, between said Cotes of first part, Sir John Astley of second part, and Sir Richard Hoare and Christopher Arnold of third part, reciting said several indentures, and that said Hoare and Arnold did agree to advance and lend to the said Sir John Astley 3000*l.* with interest at 5 per cent, to be secured by the said term of 500 years, it was witnessed, that in consideration of 3000*l.* by said Hoare and Arnold paid to Sir John Astley, the said John Cotes, by the appointment of said Sir John Astley testified as therein mentioned, did assign, and said Sir John Astley did ratify and confirm, unto said Hoare and Arnold, their executors, administrators, and assigns, all the said manor and premises, and the estate

and term of years of him the said John Cotes in the same, to hold to them for residue of said term, subject to a proviso therein contained, that if the said Sir John Astley, his heirs, executors, or administrators, or the person or persons to whom the said premises, on the determination of said term of 500 years should belong, should pay to the said Hoare and Arnold the sum of 3150*l.* at the times and in the manner therein mentioned, they, the said Hoare and Arnold, should assign said premises, &c. And Sir John Astley, for himself, his heirs, executors, and administrators, did covenant that he, his heirs, &c. would pay the said sum of 3150*l.* to Hoare and Arnold as therein mentioned.

In June 1753 Sir John Astley and Dame Mary having then issue of their bodies Richard Prince Astley (since deceased), their only son, Mary Astley (since deceased), Alicia, now Countess Dowager of Tankerville, then wife of Charles Earl of Tankerville deceased, and other daughters, and said Alicia having issue by her said husband Charles, now Earl of Tankerville, their eldest son, Sir John Astley and Dame Mary agreed to limit new uses of the said estates in the deed of 1716, and by indenture of 4th June, 1753 Sir John Astley and Dame Mary revoked the several uses before limited, subsequent to the estate for life to Sir John, and thereby limited the said manors and premises, after the death of the said Sir John Astley, to trustees for 500 years, upon the trusts therein after declared, and subject thereto, to the use of dame Mary for life, without impeachment of waste; then to the use of the said Richard Prince Astley for life, remainder to trustees to preserve, &c. remainder to his first and other sons in tail male; and in default of such issue to the use and intent that the said Alicia, Countess of Tankerville, should out of the said manor and premises for her life receive a yearly rent of 500*l.* and subject thereto, to defendant Charles Earl of Tankerville (by his then name of Lord Ossulston) for life, without impeachment of waste; then to trustees to preserve, &c. then to the use of his first and other sons in tail mail; to use of second and other sons of said Alicia in tail male; and for default of such issue to use of Sir John

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Astley and Dame Mary, their heirs and assigns for ever. Sir John Astley, being Lord of the Manor of Longdon, had from time to time purchased several copyhold estates holden of the said manor, and supposing them to have become infranchised, and having borrowed a sum of 1000*l.* of Edward Lloyd, mortgaged these several copyhold premises for securing the same by common indentures of lease and release, dated 6th and 7th August 1762.

On 18th May 1771 Sir John Astley made his will, and thereby, after giving divers legacies and annuities, he willed that all his personal estate, not otherwise by him bequeathed or disposed of, should be applied in payment of his funeral expenses, debts, and legacies, except such debts as were secured upon and might affect any of his estates in Abbey Foregates, Longdon, and Hockstow, whereof (as it was therein mentioned) he was not seized in fee. And as for all his messuages, lands, and hereditaments therein mentioned to have been purchased of Richard Adams (which were the copyhold premises in Longdon, purchased by him as aforesaid), subject to a mortgage for 1000*l.* and interest for the same to Edward Lloyd, Esq. he gave and devised the same to his grandson (the defendant Earl of Takerville), his heirs, and assigns for ever. And as to all the residue of his personal estate, he bequeathed the same to his executors after-named, to be laid out in the purchase of lands for the benefit of the plaintiff Francis Dugdale Astley and his issue male, in manner therein mentioned.

At the death of Sir John Astley the 3000*l.* and considerable arrear of interest was due. And in June 1778 Henry Hoare, executor of Sir Richard Hoare (who survived said Christopher Arnold) having called upon plaintiffs, Fletcher and Bridgewood, (the surviving executors of Sir John Astley) for the money, plaintiff Francis Dugdale Astley paid the sum of 3850*l.* for principal and interest, and thereupon by indenture of assignment of 26th June 1778, said Henry Hoare assigned the said premises for the residue of the said term of 500 years to plaintiff John Carr, as trustee for plaintiff Francis Dugdale Astley.

Plaintiff Francis Dugdale Astley also paid off the mortgage to Edward Lloyd for 1000*l.* and interest; and Edward Lloyd thereupon conveyed the said copyhold premises to plaintiff Carr, in trust, for plaintiff Astley, subject to redemption, &c.

On the death of Sir John Astley, defendant Earl of Tankerville entered as well on the settled estates as on the copyhold, and in 1780 plaintiff Francis Dugdale Astley conceiving himself entitled to receive the several sums of 3850*l.* and 1000*l.* and interest from Lord Tankerville, brought ejectment, on demise of plaintiff Carr, against him to recover possession of premises, which came on to be tried at the summer assizes at Shrewsbury, in the year 1780, when Mr. Justice *Buller* was of opinion that lessor of plaintiff could not recover the settled premises under the term for 500 years (though the grounds of this opinion did not clearly appear); and he also thought he had no legal title to the copyhold premises, and therefore nonsuited him.

The present bill was brought by Francis Dugdale Astley, John Fletcher, and John Bridgewood (the surviving executors of Sir John Astley), and John Carr against Earl of Tankerville, and his eldest son Lord Ossulston, praying that it might be declared by this court that Lord Tankerville was not entitled to have both the said 3000*l.* and 1000*l.* and interest paid out of the personal estate of Sir John Astley, and to hold and enjoy to his own use and benefit the said copyhold premises devised to him by said testator; but ought to elect either to pay said 3000*l.* and interest, and 1000*l.* and interest, or exonerate said testator's personal estate therefrom, or to give up the said copyhold premises; and that he might be decreed to make such election accordingly, &c.

Scott and *Partridge* for defendant, Earl of Tankerville, and *Attorney-General* for Lord Ossulston, insisted that the 3000*l.* ought not to be a charge upon the settled estates. First, they contended the term of 500 years was absolutely gone and at an end, by the repayment of the 3000*l.* in 1734, by Sir John Astley to Holden; for the

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words of the deed of 1725 were, "that if Sir John, his heirs, &c. &c. should pay the money as therein mentioned, then and from thenceforth the said term should cease, determine, and be void." This money being absolutely paid off by Sir John, the term was altogether at an end; or, if it was necessary to assign it to any body, it should have been assigned in trust to attend the inheritance. If then this term was at an end, Sir John had no power to raise the term again without Dame Mary's joining. The power given to them by the deed of 1716 is joint, and to be executed in a particular way, and which, if not executed accordingly, the execution is good for nothing. Here Sir John attempted to raise the term again by his sole act—but

Secondly, If the term was not *ipso facto* gone, yet this being the case of a debt of the husband, secured by the estate of the wife, this court will never suffer him to exempt his personal estate, and throw the burden on the land. The general doctrine is, that where husband and wife act upon the estate of the wife, and that for the purpose of paying a debt of the husband's, whether the husband covenant or not, this court considers it merely as a pledge for the money which is a personal debt of the husband's. This is laid down in *Earl of Huntingdon* v. *Countess of Huntingdon*, 2 *Vern.* 437, and in 1 *Bro. Parl. Ca.* 1. *Tate* v. *Austin*, 1 *Wms.* 264, and *Bagot* v. *Ougleton*, 1 *Wms.* 347. Now in this case there can be no doubt but that the term was not raised for the purpose of charging the estate with the 3000*l.* but merely lending the estate to Sir John for the better enabling him to raise the money. This appears from the personal covenant of Sir John in the deed of 1725 to repay the money: for in the common case of tenant for life having the power to raise a sum upon the estate there is no personal covenant to repay; but the estate itself is the fund to which the lender is to resort; but here the covenant is altogether personal, and indeed his personal estate has absolutely received a benefit of 3000*l.* which it ought to answer. This doctrine has been fully established by the learned judge at law: and surely if this is so at

law, there can be no reason for considering it different in equity. But at any rate as to the matter of election, how can Lord Ossulston be driven to his election? He is first tenant in tail of the settled estates, and it will be difficult to maintain that because Lord Ossulston insists upon his rights in those estates, Lord Tankerville shall give up the benefit which he takes in the copyholds under the will.

Thirdly, The counsel for Lord Tankerville insisted (for in this Lord Ossulston had no interest) that the devise of the copyhold "subject to the mortgage," will not prevent the personal estate being resorted to in the first instance to exonerate the land. This is precisely the point determined in *Serle* v. *St. Eloy*, and here the words are just as much words of description as in that case.

Mansfield in reply.—As to the first point, that the term ceased altogether on the payment of the money by Sir John, the words made use of in the deed of 1725, are merely the common words made use of in every instrument of the kind; and it may be as well argued in respect of every mortgage that is made. To be sure the moment the day of payment is past, the estate becomes absolute at law; but it is strange doctrine in a court of equity.

As to the second point in respect of its being the wife's estate, there is no doubt of the doctrine of the court upon the subject; but this is not the case of a wife's estate. This is an estate in which the wife has not even a life interest; but is in strict settlement. The husband's interest in the estate is infinitely greater in it than the wife's; for he is tenant for life, without impeachment of waste, which enables him to cut down every stick of timber on it; and it is hard if the timber on this estate is not of much greater value than 300*l.* Why then is this to be called the wife's estate? This is clearly distinguished from the cases cited.

And upon the whole it is not a very favourable circumstance for Lord Tankerville to come into this court, and say, "although Sir John Astley has given me this estate

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by a *voluntary* deed, yet I insist that he had no right to create the term *subject to which* he gave it me."

As to the third point in regard of the 1000 *l.* mortgage, the case of *Serle* v. *St. Eloy* is certainly a very strong one; but there was a devise of a trust term for payment of all debts, which may distinguish it from the present; and in this case it is to be observed, that the devise is not generally "subject to incumbrance," or "subject to mortgage," &c. but the words are very particular, "subject to a mortgage for 1000 *l.* and interest for the same, to Edward Lloyd, Esq."

The *Lord Chancellor* said he thought it high time to determine the limits of courts of law and equity with regard to trusts, and how far they were concurrent. He thought the determination of this point at Nisi Prius was going further than had ever been before; for as it stood at present, this came before him like a rehearing; as to a term *clearly satisfied*, it is not now new doctrine that a court of law takes notice of that, though formerly that was otherwise. The common language is, an ejectment is the creature of the court, and this seems now not to be merely metaphor, but the ground of solid argument.

Mansfield said, that besides the case of a term clearly satisfied, one other point of equity had been adopted by the courts of law, which was that a landlord shall not be allowed to eject his tenant after *an agreement* to lease, though no lease had been made. This was so in the case of *Weakley* on demise of *Yea* v. *Bucknell*, *Cowp.* 473. The *Lord Chancellor* said he must consider what was proper to be done.

In Court. Lord Chancellor. May 15th, 17th and 18th, 1784.

BLACKBURNE *versus* GREGSON.

ON THE EQUITY RESERVED.

Query. Whether the vendor of an estate who

John Blackburne and another, assignees of Sarah Clayton, a bankrupt, Plaintiffs.

William Gregson, William Earle, and Thomas Parke, assignees of Thomas Case a bankrupt; the said Thomas

Case, Robert Townshend, Thomas Starkie, and B. Downes, mortgagees of the estate in question, Humphrey Morice grantee under Thomas Case of an annuity charged on the estate, and Richard Bull, and John Clayton his trustees, Defendants.

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takes the bond of the vendee for the purchase money, has a lien on the lands for the purchase money remaining unpaid.

Sarah Clayton in 1774, was seized of the manor of Parr and divers estates in Lancashire and coal mines of the yearly value of 1000*l.* subject to mortgages for 12,200*l.* She was indebted, besides the mortgages, on bonds, notes, and otherwise, to the amount of 18,000*l.*; she had also engaged in securities for her nephews Jonathan Case and Thomas Case to a considerable amount. In this situation she determined to sell the Parr estate to disencumber herself, and communicated her intention to Jonathan Case; and she laid before him a rental of her estate, and a state of her debts, and desired his advice on the subject, suggesting her intention to employ either Mr. Richmond of Liverpool, or Mr. Turner of Warrington, two attornies of eminence (and the first her relation) to sell the estate. Jonathan Case represented the inconvenience to the family which might arise from a public advertisement, considering their several engagements to their creditors; but finding Mrs. Clayton resolved to sell the estate, he desired to be permitted to consult his brother Thomas Case. In consequence Thomas Case, in May 1774 proposed to purchase the estate, and eventually agreed for the purchase for 30,000*l.* viz. 12,200*l.* the mortgage money, and 17,800*l.* to be paid by Thomas Case. As the object of Mrs. Clayton in the sale of this estate was payment of her debts, it was proposed that the 17,800*l.* should be paid as her necessities should require; that Jonathan Case should give bonds for the whole 17,800*l.* in different sums, according to the rate of interest which debts of Mrs. Clayton to that amount bore, viz. 4000*l.* at 4 per cent. 12,200*l.* at 4½ per cent. and 1600 at 5 per cent.: to this Mrs. Clayton acceded. The bonds were to be dated the 1st of May 1774; from which time Thomas Case was to be owner of the estate. This treaty was a considerable time in nego-

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ciation, and at length compleated in January 1775, when indentures of lease and release were executed, dated the 2d and 3d May 1774, and made between Mrs. Clayton of the one part, and Thomas Case of the other, by which the estate was conveyed to Thomas Case in consideration of 17,800*l.* mentioned to be paid by him to Mrs. Clayton, and 12,200*l.* due to the mortgagees, which Thomas Case covenanted to pay, and a receipt for 17,800*l.* was indorsed on the release. The bonds were at the same time executed. The whole of the transaction was conducted with the greatest secrecy. It appeared from the evidence of Mrs. Clayton, that Jonathan Case was the negociator of the whole business, and acted as the common agent of both parties; that the proposal of secrecy originated from him, and was occasioned by the apprehension that the knowledge of her having disposed of her estate would make all their creditors clamorous for their money, and put both Thomas Case and Jonathan Case to great inconvenience. Thomas Case had also desired that the purchase might be concealed, and particularly from Mr. Richmond who had been employed to raise money both for Thomas Case and Mrs. Clayton; the attorney employed on the occasion was Mr. *Hodgkinson* of Prescot, who was actually employed in business by Jonathan Case; and it appeared from his evidence that Jonathan Case had desired the deeds might be prepared by *Hodgkinson* with his own hand, to prevent a discovery of the transaction; that *Hodgkinson* having complied with this, was also requested by Jonathan Case to ingross the deeds himself, but at length prevailed on Jonathan Case to permit them to be engrossed by a clerk on whose fidelity he could rely. It also appeared that *Hodgkinson* finding the 17,800*l.* was not to be paid at the execution of the conveyance, had in the first draft of the conveyance made it payable by instalments, with a proviso making the conveyance void in case of nonpayment of any of the instalments, and that Jonathan Case objecting to this, conceiving that default in payment even of the last instalment would make the whole void, *Hodgkinson* proposed a mortgage by a separate deed, which Jonathan Case

approved; that *Hodgkinson* prepared a draft of a mortgage accordingly, which he sent to Jonathan Case, and urged the execution of it; and at the time of the execution of the conveyance in 1775, he asked Thomas Case, what was to be done about the mortgage; to which question Case replied, "that he would settle that matter himself with his aunt." *Hodgkinson* also said, that he received all his instructions from Jonathan Case, and had no personal conversation with Mrs. Clayton or Thomas Case on the subject, till the deeds were executed, which was on the 9th of January 1775, at Jonathan Case's house. It appeared also from evidence that Thomas Case from the year 1772 had been the manager of Mrs. Clayton's estate at Parr, and that there was no apparent change in the possession in consequence of the sale. On the contrary Mrs. Clayton and the two Cases industriously concealed the change of property; annd Thomas Case's agent on the spot gave out in the neighbourhood, that Case had agreed to give Mrs. Clayton a yearly rent for the estate, and made the most he could of the produce. Mr. *Richmond* particularly swore, that, though a relation of Mrs. Clayton and employed as her attorney, he had no idea that she had parted with the property till 1778, after a commission of bankrupt had been sued out against Case, and he had been declared a bankrupt, which was in March 1778. He also said that after 1774 he had continued to procure money for Thomas Case and Mrs. Clayton, conceiving her to be the owner of the estate, and on her credit as owner. He particularly stated that Thomas Crowder, a creditor of Thomas Case for 6000*l.* which he had procured for Thomas Case, desired Case to give him a real security, that Case had declared he had no real estate, and had proposed to prevail on Mrs. Clayton to give her bond as a further security, and that she had given her bond accordingly, which was accepted under the idea that she remained owner of the Parr estate; that afterwards Crowder had desired a specific security by mortgage from Mrs. Clayton, and Thomas Case being applied to for this purpose, declined speaking to Mrs. Clayton, but did not suggest that she had sold the estate to him.

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It was also proved that on Thomas Case's marriage in 1775, being called upon to make a settlement, he had declared that he had no real estate, except a small property of the value of 1600*l.* and therefore could not make the settlement required. It also appeared in evidence, that Case's debts proved under the commission against him amounted to 147,000*l.* and upwards, and those claimed amounted to 88,000*l.* and upwards, and that his effects amounted to 42,000*l.* besides desperate debts in the West Indies of about 70,000*l.* so that if all his effects had been collected, there would have been a deficiency of 70,000*l.*

Upon this case it was contended: First, that Mr. Clayton's assignees had a lien in equity on the estate for so much of the 17,200*l.* as remained unpaid; either on the ground of natural equity arising from the nature of the transactions between Mrs. Clayton and Thomas Case, or on the ground of express contract; and that this lien had not been relinquished by her. Secondly, That if the lien had been relinquished, the relinquishment had been obtained by fraud. Thirdly, That if Mrs. Clayton's assignees had not in equity the lien they contended for, the conveyances were made void as to the creditors of Mrs. Clayton by the 13th *Eliz. C.* 5.

Upon the original hearing of the cause, on the 26th day of May 1783, the court directed an issue, to try, whether Thomas Case was a bankrupt on the 30th of November 1777, the date of Morrice's security, with the usual directions for liberty to indorse on the postea the time he became a bankrupt.

The jury on trial of this issue found that Thomas Case did commit an act of bankruptcy prior to the 13th of November 1777.

This cause now came on again to be heard on the equity reserved, when it was argued by *Scott* and *Mitford* on the first point, that according to the law of all nations, the absolute dominion over property sold is not acquired by the purchaser until he had paid the price, or otherwise satisfied it, unless the vendor has agreed to trust to the personal credit of the buyer; *dominium rei venditæ non transit in*

emptorem, etiam si res tradatur, nisi pretium sit solutum, vel aliter satisfactum, aut habita sit fides de pretio; that this had been considered in other countries as a natural equity arising from the nature of the transaction of buying and selling, and that it had been acknowledged and adopted by the courts of equity in England; that a distinction had been made, borrowed from a rule of the civil law, that if payment was acknowledged in the written evidence of the contract, the claim of the seller should not prejudice subsequent purchasers, because they would be otherwise deceived; but it should still be effectual against the first purchaser himself and his general creditors, and that therefore the rule was laid down by Lord *Hardwicke*, in *Harrison* v. *Southcote*, 2 *Ves.* 389, that against every person but a purchaser without notice, the vendor was considered as a privileged creditor, entitled to preference in payment. And in the present case against Mr. Morice, the plaintiffs could not have asserted a title to preferable payment, if his security had been valid against the general creditors of Case; and therefore on the first hearing, an issue had been directed to try whether Case was a bankrupt when he made the security to Morice, and that fact having been found, the conveyance to Morice and his trustees was void, and did not impede the justice due to the plaintiffs as assignees of Mrs. Clayton. In support of this point *we* recited *Chapman* v. *Tanner*, 1 *Vern.* 267, as to which case it had been objected that there was a special agreement between the parties which took it out of the general rule; but it appeared by the Register's book, that although such special agreement had been insisted upon by the defendant in his answer, yet that answer was replied to, and there was no evidence in the cause upon this head; and it therefore could not be the ground of the decision; but at the same time it must be allowed, that there was another circumstance in the case which might have had weight, which was, that some of the title deeds remained in the hands of the vendor. *Tordiffe* v. *Scrugham*, before Lord *Camden*, on the 8th of December 1769: "Hewitson and his wife seized of a farm in Northumberland of the yearly value of 55*l.* and being ad-

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vanced in age, and desirous of advancing their two daughters, plaintiff Elizabeth, and Mary deceased, proposed to convey to plaintiff and her sister, in consideration of an annuity of 20*l.* per annum, for the joint lives of Hewitson and his wife, and the payment of Hewitson's debts. By indentures of lease and release Hewitson and his wife, in consideration of natural love and affection, and of five shillings, conveyed to plaintiff Elizabeth and her sister Mary, as joint tenants. Plaintiff and her sister gave a bond in penalty of 500*l.* for payment of the annuity, but Hewitson and his wife did not deliver up the deeds till the vendors had promised before witnesses to pay Hewitson's debts, amounting to 190*l.* Defendant married Mary Hewitson: previous to the marriage the annuity was regularly paid; and defendant was apprised of the bond before the marriage, and after the marriage paid half a year's annuity; but upon his wife's death, although the moiety of the estate was conveyed to him for life, refused to pay any further. Lord *Camden* declared, that the moiety of the 20*l.* per annum was to be considered as part of the consideration for the original purchase of all the estate, and that the same ought therefore to be paid in equal moieties by the plaintiff and defendant, and it was referred to the master to take an account of the arrears of the annuity, and decreed that the defendant should be charged with a moiety of the annuity from the death of his wife, and that he should keep down the growing payments of the annuity in like proportion during his life, and the rest of the bill was dismissed." To this point were also cited, as cases in which the principle had been acknowleged, *Pollexfen* v. *Moore*, 3 *Atk.* 272, and *Walker* v. *Preswick*, 2 *Ves.* 622, where the rule applied to land is very clearly stated by Lord *Hardwicke*, as the ground of an analogous decision in the case of a Chattel; and Sir T. *Clarke's* opinion in *Burgess* v. *Wheate*, 1 *Black.* 150, where in argument he states the rule in the same extent. To these cases had been objected, on the former hearing, *Fowell* v. *Heylis* before Lord *Bathurst*, on the 14th June 1773. "Plaintiff and her son, joint tenants of the manor of Ormside and other lands, by lease and release of July 1768,

between plaintiff of the one part, and James Fowell, the son, of the other part, in consideration of 1000*l.* and natural love and affection, plaintiff released all her moiety in the estate to the son in fee. Plaintiff accepted two bonds for the consideration money, one for payment of 800*l.* to plaintiff, the other for payment of an annuity of 20*l.* under her directions. James Fowell died in 1770, being considerably indebted, and gave this estate to Heylis and others in trust to sell it, and pay the money to his creditors. Plaintiff received 280*l.* in part of the consideration money, but no more. This bill was against the trustees, that they might out of the purchase money pay plaintiff the remainder of the consideration. Defendants insisted that plaintiffs should come in with the other creditors. Lord *Bathurst* took time to consider, and afterwards determined that the court could not assist plaintiff any more than the vendor of goods to a bankrupt, and dismissed the bill." But the case of *Fowell* v. *Heylis* might be distinguished; for there the demand was not made against the vendee but against the trustees; there was a legal estate against an equitable claim; but in the present case both were equitable claims, and the plaintiffs had the prior one, and the court would relieve a specific creditor against the general ones, as appears by *Tayler* v. *Wheeler*, 2 *Vern.* 564. It also had been objected on the part of the defendants, that in the present case, the price had been otherwise satisfied than by payment; and that the vendor had trusted to the personal credit of the purchaser. It was answered that the object of the purchase was to preserve the estate in the family, and relieve Mrs. Clayton from her debts; that the agreement was to take the estate at 30,000*l.* subject to the mortgages for 12,200*l.* and the debts of Mrs. Clayton to be paid to the amount of 17,800*l.* that the contract therefore was not for payment of 17,800*l.* to Mrs. Clayton, but for discharge of debts of Mrs. Clayton to that amount; that those debts bore different rates of interest; accordingly, the bonds were taken not in satisfaction of so much purchase money, but as evidence that it had been paid, and to regulate the manner in which it was to be paid; that it was not intended as a satisfaction nor ac-

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fraud. At the time therefore of the original transaction there was no fraud intended. At what point it arose, it will be difficult to determine. At all events the transaction can scarcely be called fraudulent, when the acknowledged purpose was to pay creditors.

As to the general question of the lien, it is called a natural lien; but it certainly is not so with respect to personalty, which if once delivered, it is conclusive, though concealed from all mankind: and there seems as much natural equity in the case of personalty as realty. It is a full answer to the case of *Chapman* and *Tanner*, that the purchaser had not parted with the title deeds. As to *Harrison* v. *Southcote*, and *Walker* v. *Preswich*, they are merely scraps of *obiter* opinions, from which it is impossible to lay down the law of the court, and they were all considered in the case of *Fowell* v. *Heylis*, which is an authority in point for defendants.

The *Lord Chancellor* thought it was necessary to determine, in the first place, whether the transaction was fraudulent within the statute of 13th *Eliz.* or 21 *Jas.* and that those questions were proper to be decided by a jury; for in case this transaction should be found to be fraudulent, there would be an end of the question, respecting the lien. He therefore directed two issues to try the question under the respective statutes.

The issues were,

First, To try whether the conveyance by the deed of the 2d and 3d of May 1774, was made with a view to deceive the creditors of Sarah Clayton under the statute of 13th *Eliz. c.* 25.

Second, Whether it was an act of bankruptcy within the statute of 1st *James I. c.* 15.

The jury found that the conveyance was made with a view to deceive creditors contrary to 13*th Eliz.*

And on the second issue they found it was *not* an act of bankruptcy within 1 *James I. c.* 15, but this last issue was purposely given up by the assignees of Mrs. Clayton, as it would have overturned their commission if found for them,

and therefore produced no evidence to shew, that she was a trader at the time. *Blackburne v. Gregson.*

In *Hilary Term* 1785, the cause came on upon the equity served, when the court ordered an account of the money paid by Case to Mrs. Clayton, or on her account, and an account of the rents received by him. If the rents exceeded the money paid, the assignees of Mrs. Clayton to be admitted creditors under his commission; if less, the balance to be deducted out of rent received by the assignees of Case, and if it exceeded that rent, the excess to be paid to the assignees of Case, and they to deliver up deeds, &c. A point was attempted on the part of Morrice, *viz.* that as Case had no estate for his own benefit, the conveyance to him being void against Mrs. Clayton's creditors, his conveyance to Morrice was not void as against his assignees; and that as to Mrs. Clayton's assignees, he was a *bona fide* purchaser within the saving of the statute of *Elizabeth:* but the *Chancellor* was of opinion, that the conveyance to Case was good against all but Mrs. Clayton's creditors, that was therefore a beneficial interest to Case which passed to his assignees. But if otherwise, he could not suffer a technical distinction to obstruct substantial justice.

DOVE *versus* DOVE.

In Court. May 22, 1784.

Practice. Writ of assistance.

An application having been made on the behalf of a purchaser for an order on the tenant in possession (who was a party in the cause) to deliver possession to the purchaser under a common order having been obtained) the party having been served with a writ of execution of the order and an attachment for non-obedience to it, the tenant still refusing to deliver possession, the purchaser moved some time since for an injunction. That writ having been *personally* served upon affidavit of that fact and of disobedience to it, Mr. King moved this day for a writ of assistance, which was granted.

Talbot v De Held 2 Simm. & S. 140.

In Linc. Inn Hall, May 27, 1784. Lord Chancellor.

WELLER *versus* SMEATON.

DEMURRER.

Bill stated the plaintiff to be lessee of an ancient mill, and that defendant had erected floodgates and other works on the river, which obstructed plaintiff's mill, and prayed that defendant might be decreed to pull down these works, and be restrained from erecting new ones: such works having been erected above three years, such a bill will not lie until the right be established at law, and a demurrer for want of equity is good.

Plaintiff, who was lessee of an ancient mill on the river Ravensbourne, filed his bill against the defendant, stating his own title, and charging that defendant had erected certain floodgates and other works upon the said river, above plaintiff's mill, for the purpose of conveying the water of the said river to Deptford and Greenwich, whereby plaintiff's mill was obstructed, and that defendant had no right to erect such works, &c. and praying that plaintiff might be quieted by the injunction of this court in the possession of his mill, and that defendant might be decreed to pull down his several works, and might be restrained by injunction from building any other works, &c.

To so much of the relief prayed as required the works to be pulled down, and defendant to be restrained, &c. Defendant demurred; for that plaintiff ought to have established his right at law in the premises, before he required the aid of this court.

Mansfield, *Madocks*, and *Stanley*, for plaintiff.

The case of *Bush* v. *Western*, in *Pre. Cha.* 530, proves that this kind of suit is properly brought in this court in the first instance, without being driven previously to law. It is analagous to the cases of diverting watercourses, which this court has expressly made a head of equity: several cases in *Viner*, title *Chancery*, 425, 427; So in *Mayor of York* v. *Pilkington*. 1 *Atks*, 282. *How* v. *Tenants of Bromsgrove*, 1 *Vern.* 22. *New Elme Hospital* v, *Andover*, 1 *Vern.* 266.

Besides, this demurrer being merely to the relief, a full discovery is now obtained, and it will put the parties to a new and unnecessary trouble and expense. It is not at all the same case as an application by plaintiff for an injunction.

Weller v. *Sneaton.*

Scott and *King* for defendant.—This court will never permit a bill of this kind until the right is established at law, for this is a dispute between two individuals respecting a right in which no third person is concerned, and therefore cannot be said to prevent any multiplicity of suits. *Lord Teynham* v. *Herbert.* 2 *Atks.* 483. *City of London* v. *Perkyns,* 4 *Bro. Parl. Ca.* 157. *Vin. Tit. Chancery,* 425, *pl.* 35. *Whitchurch* v. *Hyde,* 2 *Atks.* 391.

Lord Chancellor.—I take it to be a head of equity to interpose by way of injunction, when a party is erecting new works upon an old possession; but when the works have been permitted to remain three years, that is considered such a laches as to preclude the party from having relief here without going first to law. In this case it has been put upon this ground, that it is within the equity of this court to take *ex ab origine* a question whether or not a right is violated. It struck me immediately, from a general recollection of the cases, that the court has exercised no such jurisdiction. There are two ways in which applications to this court have been made in this kind of case: first, in order to compel the party to try the right, which was one part of the case of *Welby* v. *Duke of Portland,* in House of Lords. Secondly, to prevent a multiplicity of suits, which was also a point in the same case; and most of the cases on the subject had been looked into upon that occasion, and it was found that in no instance, except that of *Bush* v. *Western,* this court had ever interposed in a mere question of right between *A.* and *B.*, they having an immediate opportunity of trying the right at law, which would be definitive. If after the trial the party should begin again and commit trespasses, it is possible a case might be made to induce this court to interpose by way of injunction; but merely when one party claims and another denies a right, it is impossible for the court to entertain the bill.—The demurrer must therefore be allowed.

MAWER *versus* MAWER.

In Linc. Inn Hall. Lord Chancellor. June 8, 1784.

The statute of 5th Geo. II. for taking bills *pro confesso* against defendants extends as well to cases where the party has been served with the former, but hath avoided the subsequent process, as to cases where it has been impossible to serve the party with any process at all.

On a bill of foreclosure the defendant had been served with the subpœna, but did not appear, and thereupon plaintiff proceeded to attachment, and so on to a sequestration; but the defendant could not be found upon any of these processes. The sequestrators having returned that defendant had no real or personal estate, *Lloyd* now moved that the bill might be taken *pro confesso*. Some doubt had arisen whether this was a case within the statute, 5 *Geo.* II. on the idea that that act extended only to cases where defendant had never been served at all, whereas in this case he had been served with subpœna, though not with the subsequent process. But the *Lord Chancellor* looking into the act was of opinion, that it extended to every case where the party had avoided any part of the process whatever, though he might have been served with subpœna, &c.

NEALE *versus* WADESON.

In Linc. Inn Hall. Lord Chancellor. June 8, 1784.

The bill being referred for impertinence, the plaintiff cannot move (as of course) for an injunction for want of an answer, but is in the same situation as if the time for answering were not out, until the Master has reported on the reference.

An order had been obtained by plaintiff for an injunction for want of an answer, as a motion of course. *Harvey* now moved to set aside that order for irregularity, on the ground of the bill having been referred for impertinence before the time for answering was out; and contended that the referring the bill for impertinence staid, of course, all the proceedings in the cause. And he cited a case of *Harris* v. *Montgomery* before the present *Lord Chancellor* in Hilary term, 1783, for that purpose. The *Lord Chancellor* said that the rule was not generally that the referring the bill for impertinence staid all proceedings, but was only this, viz. that upon a bill's being referred before the time for answering is out, the plaintiff should not at the expira-

tion of the time move for an injuncion as of course for want of an answer, but should be in the same situation as if the time for answering was not out, in which case he must move it upon notice and affidavit of circumstances. If this case, therefore, had rested on the single ground aforesaid, plaintiff could not have obtained the injunction without giving notice of motion: but here it afterwards appeared the defendant's clerk in court had taken upon himself to wave taking advantage of the irregularity, by agreeing that plaintiff should take his injunction as for want of an answer.

KITTIER *versus* RAYNES.

In Chancery, June 12, 1784.

A father, being tenant for life of an estate, with remainder to his son in tail, the father and son join in mortgaging the estate for the debt of the father. The father becomes bankrupt, and the mortgaged estate is sold under the commission. The son cannot prove any debt under the commission in respect of his interest in the estate, not being damnified until after the bankruptcy.

The father being tenant for life of a settled estate, with remainder to the son in tail, the father and son joined in suffering a recovery, and mortgaging the settled estate, together with some unsettled estates of the father's, for a sum of 3000*l.* for the father's use. The father became a bankrupt, the mortgage remaining unsatisfied, and the assignees absolutely sold (*a*) this settled estate, together with the others, without taking any notice of the son's interest in it; and they applied the produce under the commission. It was now prayed on the behalf of the plaintiff, the son, that it might be referred to a Master to ascertain the value of the plaintiff's interest in the estate at the time of the mortgage, and that he might be allowed to prove the amount of such value under the commission, he having merely lent his estate for the use and accommodation of the father.

Lord Chancellor said he could not distinguish this case from the common one of A's joining in a bond, or giving a collateral bond to secure the debt of B.; in which case the surety cannot prove the debt under the commission, unless

(*a*) The mortgaged premises sold for much less than the money due for principal and interest.

Kittier v. Rayney.

he has been actually called upon for the money before the bankruptcy; the one is a personal pledge, the other a pledge of the estate. To be sure the justice of the case would have been, that the mortgagee should have proved his debt under the commission, and taken his dividend, and should have come upon the pledge for the deficiency, and the assignees ought not to have sold; but it is impossible to remedy this, as the mortgagee is not a party. Here the mortgagee has made his election to retain the pledge, and it has been sold; and the question is, whether the estate, having been applied in payment of the father's debts, the son, who is the owner, is entitled to come in under the bankruptcy; my doubt arises on the date of the debt, for there is no doubt of his being a creditor of the bankrupt. But as no money had been paid before the bankruptcy, it seems to me that the plaintiff is altogether without relief, and I must dismiss the bill.—*Reg. Lib. A. 1783, fol. 467.*

BOYNTUN *versus* BOYNTUN.

In Court. June 14, 1784.

ON FURTHER DIRECTIONS.

A real estate charged with payment of debts, in aid of the personal estate, shall be applied before the widow's paraphernalia.

Sir Griffiths Boyntun having by his will empowered his wife (executrix) to raise by mortgage of a particular real estate a sufficient sum of money for payment of his debts, in aid of his personal estate, and having devised to his wife the use of her jewels for her life, a question arose whether the wife was not entitled to the jewels absolutely as her paraphernalia, although the personal estate was not sufficient to pay the debts; or whether they should be applied before the real estate charged; and on the authority of *Tipping* v. *Tipping*, 1 *Wm.* 729, the *Lord Chancellor* decreed the jewels to the wife in prejudice of the charged estate.—*Reg. Lib. A.* 1784, *fol.* 531.

SAYER *versus* BENNET.

At the Rolls. Sir L. Kenyon. June 21, 1784.

If a partner is so far disordered in his mind as to be incapable of conducting the business according to the terms of the articles of co-partnership, a court of equity will dissolve the partnership.

Jones v Say 2 M & K. 125. Beech v Keeble Phill. 172 Anonymous 2 Key V.S. 447. Jones v Lloyd 18 Eq. 273

This was a bill brought to dissolve a partnership, which had been entered into between plaintiff and defendant on the ground of the defendant's having been recently insane.

It was in proof, on the part of the plaintiff, that in the year 1760 defendant came to live with plaintiff as a servant, and afterwards as an apprentice; plaintiff was at that time in a very considerable trade as a print and map-seller, and employed a great number of workmen to engrave under his directions. About 1773 the plaintiff finding the business too laborious for him singly, agreed with defendant, who had then served out his apprenticeship, that if defendant would serve him for four years as a journeyman, he would after that time take him into partnership; plaintiff to be concerned in two-thirds, and defendant in one-third of the business. In or about 1777 the four years expired, and plaintiff then took defendant into partnership in the above-named proportion, and he also became security for the money which defendant borrowed to bring into the trade as his share of the capital. In the articles of copartnership it was expressly recited, that "plaintiff was minded to ease himself in the said business." Defendant continued very attentive to the business till the year 1781; he then grew very violent in his temper, and frequently quarrelled with the workmen, so that they would not work any longer for the shop; and at other times was very extravagant in the payment of the workmen. In April 1783 he was quite insane, and removed to Brook-house, under the care of Doctor Monro, where it was found necessary to confine him by a strait waistcoat. He continued in confinement for nine months, but the last six weeks he was by Doctor Monro's consent removed to private lodgings. No commission of lunacy was ever mentioned.

Ambler and *Lloyd* for plaintiff insisted this was a proper ground for the interference of this court to dissolve the

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partnership. Although a partnership is made for the term of life, yet there are many things besides death will be held sufficient to dissolve it. So in case of bankruptcy of one partner: and a supersedeas of the commission will not restore the partnership; and the reason is that the partner by the loss of his property is disabled from contributing to the carrying on the business. If so, loss of senses is a still stronger case, and more especially in this case, where it appears that the great object of plaintiff in taking defendant into partnership, was, that it might ease him of the trouble. But this is said to have been only a temporary disorder; but from the nature of it, it is not improbable that it may return, which it very frequently does; and if (as it is said on the other side) it arose from too great attention to business, nothing is so likely to bring it back as returning to that business. At present he lives with his own family, and probably under particular care, but that is no security for his continuing well if he returned to business; and this business, from its extent, is of the greatest consequence, as it appears that in the year 1781 the profits amounted to 4600 *l.*

On the part of the defendant three persons were examined, two of whom were apothecaries, who said they had conversed with defendant frequently since his confinement, and that he appeared to be a man of sound mind and understanding, and fit to carry on business; and one of the apothecaries said, that in his opinion there was no likelihood of the disorder's returning.

Selwyn and *Ainge* for defendant.—It is now confessed that there is no case where a court of equity has dissolved a partnership merely on account of a temporary disorder in one of the partners. No case has been cited to prove that, even if he continued a lunatic, a court of equity could dissolve this contract; and it seems reasonable that it should not be so, for it is always possible the party may recover; but here the party is indisputably recovered. We must, on the other hand admit, he was for a short time insane; but he was discharged under Doctor Monro's directions, and appears to be now fit for carrying on the business. As to

the case of a bankrupt, to which this has been compared, there is a very essential difference, which is, that in case of bankruptcy the whole of the bankrupt's property is by act of Parliament vested in other persons, and he is therefore utterly incapacitated from carrying on the business. The case of *Huddlestone*, cited in 2 *Ves.* 35, seems to apply to the present.

Ambler, in reply, observed, that the case of *Pearce* v. *Chamberlain*, 2 *Ves.* 33. (in which *Huddlestone's* case is cited) seems to give weight to the circumstance of the new partner being taken in for the purpose of easing the old one, and the necessity of the new partner attending personally, which tends to answer the idea of substituting a deputy for defendant, which had been hinted at on the other side.

Master of the Rolls.—This point is a new one, and if I conceived any industry of mine would throw any light upon the subject, I would take time to consider of my opinion; but as I do not know of any authority to guide me, and as I have made up my mind as to what I ought to do, I shall give my sentiments now. I shall barely refer to the case, without entering minutely into the circumstances. Mr. Sayer was a printseller in a very established business: he took Bennet first as an apprentice, then as a journeyman, and after four years he made him a partner, as to one third of the trade. In this stage of the business he certainly acted with great kindness to him. The partnership deed shews that Sayer was rather tired of business, and recites that "Sayer was minded to ease himself;" Bennet was therefore to advance his share, and to take the chief part of the business on himself. I think, indeed, it may be laid down as a general rule (without considering the particular circumstances of the case) that when partners are to contribute skill and industry, as well as capital, if one partner becomes unable to contribute that skill, a court of equity ought to interfere for both their sakes; for both have stakes in the partnership, and are interested in having it carried on properly, and the court ought to see that the property of the party, unable to take

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case of himself, should be taken care of for him. It appears that few people care to leave the management of their property to other persons; and as a lunatic has no power of managing his own property, so a court of equity will not deliver it to persons to whom the party himself has not committed it. If, therefore, the defendant continued in the same situation as he has been, I should have no difficulty in saying that the partnership ought to be dissolved, though there may be no precedent for the purpose. As to what is said with respect to a substitute for defendant, that is what Sayer never intended by the partnership; he never meant to take a partner from a court of equity. The next thing is, how far his present situation ought to influence the court. I think I may say that, if it were *clearly* established that Bennet had recovered his senses, and there were no probability of a relapse, it would be too much to dissolve the partnership; (nor if it were otherwise, could this court dissolve it with a retrospect to the time of the disorder's commencing; for as his capital has been embarked during all that time, he must have the profits of it.) If I was clearly satisfied that Bennet was restored to a sound mind, and could afford the proper assistance to Sayer, the partnership ought not to be dissolved. In *Huddlestone's* case it does not appear what was the extent of the dejection of mind. Every body knows that it is very frequent for persons once mad not to recover. And in this case I cannot find what the apothecary forms his opinion upon as to the likelihood of Bennet's recovery. I am astonished that neither party examined Doctor Monro; he ought to have had frequent and recent opportunities of seeing him. Every lunatic is supposed to have lucid intervals, and it might be that these were selected for his being seen by these witnesses; at least it is not made to appear sufficiently to me. His family, with whom he has lived, ought to have stated it: under these circumstances I have great difficulty. On the principle I have no doubt; but I cannot tell how the circumstances apply; I must therefore direct a new kind of inquiry, which is, the Master must inquire whether Bennet is now in such a

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state of mind as to be able to conduct this business in partnership with Mr. Sayer according to the articles of co-partnership; for if he has merely a ray of intellect, I ought not to reingraft him in his partnership, and that in mercy to both, for the property of both is concerned, and he who cannot dispose of his property by law, must be restrained here. I have therefore no manner of doubt of the principle.

It was referred to the Master to inquire whether the defendant was in such a state of mind as to be able to conduct the business in partnership with the plaintiff, according to the articles of partnership, and how long he had been so.—*Reg. Lib. B. 1783, fol. 500.*

The Master reported that several witnesses had been examined before him, and that the defendant Bennet had attended and been examined by him personally; and the Master was of opinion that the said defendant *was* in such a state of mind, &c. and had been so since November, 1783.

The plaintiff took an exception to the report, on the hearing of which the court directed an issue to try whether the said defendant on the 9th day of December, 1783, was in such a state of mind, &c. &c. and "whether he has since been and now is in such a state of mind."—*Reg. Lib. 1785, B. fol. 59.*

It does not appear what became of the issue.

EARL OF WARWICK *versus* DUKE OF BEAUFORT.

In Exchequer. L.C. B. Skynner, B. Eyre, B. Hotham, B. Perryn. July 14, 1784.

Shewing cause against dissolving an injunction is not such a proceeding in a cause as to pre-

On the common motion having been made to dismiss the bill for want of prosecution, on a suggestion of no proceedings having been had since a certain time, the usual order was made. It was now moved by *Richards* to discharge that order, on the ground that since the time specified, cause had been shewn against dissolving an injunction: and the question was, whether this was such a

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proceeding in the cause, as would prevent the dismissal of the bill.

And the court was clearly of opinion, that this kind of interlocutory application was not to be considered as taking a step in the cause, and therefore that the order ought to stand.

vent the bill being dismissed for want of prosecution.

HEPWORTH *versus* TAYLOR.

In Linc. Inn Hall. Lord Chancellor. July 15, 1784.

The testator by his will gave legacies to his three children respectively payable after the decease of his executrix, one of which was a sum of 120 *l.* to his daughter Sarah Taylor; and he then proceeded, "if any of my above-mentioned children should happen to die unmarried *and* without issue, before the death of my executrix, the sum or sums which would have otherwise been due to them shall be equally divided amongst the rest of my surviving children."

Testator gave legacies to his threechildren, payable after the death of his executrix, and directed that if any of the children should die unmarried *and* without issue before the death of the executrix, the legacy should go to the surviving children. One of the daughters *married*, but died without issue in the life-time of the executrix. Her legacy survived to the other children.

Sarah Taylor married the plaintiff, and then died in the life-time of the executrix, but without issue; and the single question was, whether the limitation over to the surviving children was, in the event which had happened, to take effect.

On the part of the defendants, the surviving children, *King* cited *Sir Wm. Jones*, 205, and *Brownsword* v. *Edwards* 2 *Ves.* 243, and the *Lord Chancellor* was clearly of opinion that it survived to the other children.

WELLES *versus* MIDDLETON.

In Linc. Inn Hall. Lord Chancellor. July 12, 13, *and* 15, 1784.

This was a bill brought by the heirs at law and next of kin of John Wilcox, to set aside certain deeds as being obtained by the defendants from the said John Wilcox, by fraud and imposition.

A court of equity upon

Hindson v Weatherill, 5 D. M. Gy. 306. Tomson v Judge 3 Drewry 314.

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general principles of policy will set aside any gift made by a client to an attorney during the time when the attorney has in his hands the transaction of the client's affairs, without any proof of actual fraud.

1 Ves & C. 2. 164

The property in question devolved upon John Wilcox, by the sudden death of William Wilcox his first cousin intestate, to whom John was heir at law and next of kin: John Wilcox was at this time about seventy-two years old, and till then had lived in great indigence; and there was great contrariety of evidence with respect to his capacity; some witnesses considering him as a madman, some of very low intellects, some as having impaired both body and mind by excessive drinking; but many of the defendant's witnesses considered him as a man of good understanding. The defendants, James and John Middleton, were brothers, and both attornies, and related in some degree to John Wilcox, being second cousins to him; the plaintiffs were his nieces and co-heiresses. Early in the morning of the 27th of July, 1776, William Wilcox died at Portsmouth. The same morning Mr. Binsteed, an attorney of Portsmouth, sent a letter to Mr. Willes, an attorney at Ringwood, acquainting him of the death of William Wilcox, and saying that he (Binsteed) knew of no will, and desiring to know whether Willes knew of any. This letter Willes immediately carried to the defendant James Middleton (who lived at Ringwood) in the night between the 27th and 28th. Early in the morning of the 28th James Middleton sent to John Wilcox (who also lived at Ringwood), and they immediately set off together in a post-chaise to Rumsey (where John Middleton lived), and having told him of the death of William Wilcox, they all three set off for Portsmouth, the defendants accompanying John Wilcox with a view, as stated by their own answer, of advising and assisting him in the management of his affairs. In their way to Portsmouth they went through Winchester, and although it was Sunday, John Wilcox took out letters of administration as next of kin of William Wilcox from the Diocesan Court of Winchester. On the 29th of July they proceeded to Portsmouth, and having searched the papers, &c. of William Wilcox to no purpose for a will, they staid seven or eight days at Portsmouth, and then went back again. It appeared by the testimony of one witness (James Collins) that during

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these seven or eight days the defendants had prepared a will for John Wilcox to execute, by which the whole property which came to him on the death of William was given to the defendants absolutely. This will was read over to Collins by the defendants, but they afterwards declared to Collins that "as a will was alterable, John Wilcox might be persuaded when he returned to Ringwood to alter it." And they then tore it in the presence of Collins.

William Wilcox having died possessed (amongst other things) of 50 *l.* long annuities, it was necessary to take out a prerogative administration, and upon the 11th of August the defendants wrote to some correspondent in London for a commission to take out letters of administration. On the 14th the commission was returned. On the 16th the defendants and John Wilcox went a second time to Portsmouth; and before the prerogative letters of administration arrived there, the first deed in question was executed. It was dated and executed on the 20th of August, and made between the said "John Wilcox, by the name and addition of John Wilcox, of Ringwood, in the county of Southampton, Gentleman, heir at law, and sole next of kin of William Wilcox late of Portsmouth Common in the said county, Gentleman, deceased, of the one part, and James Middleton, of Ringwood aforesaid Gentleman, and John Middleton, of Rumsey in the said county Gentleman, of the other part, reciting that the said William Wilcox, on or about the 27th day of July last past, died intestate, leaving the said John Wilcox his heir at law and sole next of kin, and that he the said John Wilcox being perfectly satisfied of the said William Wilcox's friendship and good intentions towards the said James and John Middleton, who were also nearly related to the said intestate; and that from the public declarations of the said William Wilcox in his lifetime, it was very much to be expected that he would have given the greatest part of his real and personal estate to the said defendants, had the same intestate made a will, and reciting that the said John Wilcox being very old and infirm, so as not to be able to manage and transact the affairs of the

said intestate, and being desirous of fulfilling the good intentions and designs of the said William Wilcox towards the said James and John Middleton, he the said John Wilcox had voluntarily proposed and agreed to grant, bargain, sell, and assign all the said William Wilcox's real and personal estates to the said James and John Middleton, in trust for the several uses and purposes therein after particularly mentioned; it is thereby witnessed that for the considerations aforesaid, and also in consideration of the natural love and affection which the said John Wilcox had towards the said James and John Middleton, and of the sum of five shillings to him in hand paid by the said James and John Middleton at or before the sealing and delivery thereof, he the said John Wilcox did freely and voluntarily give, grant, bargain, sell, assign, transfer, and set over unto the said James and John Middleton, their heirs and assigns, the ancient freehold, dwelling-house, and garden, with the appurtenances, and the cottage thereto adjoining, in the town of Ringwood aforesaid, and the freehold dwelling-house and garden, with the appurtenances on Portsmouth Common aforesaid, and four small copyhold estates of inheritance in and held of the manor of Havant, which was all late the property of the said William Wilcox, and of which he died seized and possessed in fee; to hold to the said James and John Middleton, their heirs and assigns, for ever. And it was thereby further witnessed, that in the considerations aforesaid, and of the sum of five shillings in hand paid by the said James and John Middleton at or before the sealing and delivery thereof, he the said John Wilcox did freely and voluntarily give, assign, transfer, and set over to the said James and John Middleton, their executors, administrators, and assigns, all the household furniture, monies, securities for money, government securities, and all other the personal estate of the said William Wilcox, of which the said John Wilcox was then possessed or entitled to as his administrator and sole next of kin; to have and to hold all the household furniture, money, securities for money, government securities, and other the personal estate of the said William Wilcox, thereby given,

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assigned, and set over unto the said James and John Middleton, their executors, administrators, and assigns, as their own proper goods and chattels for ever; all which said freehold and copyhold premises, household furniture, and other the personal estate so given, granted, bargained, sold, and assigned unto the said James and John Middleton, their executors, administrators, and assigns, were so given, granted, and assigned to them, in trust in the first place to pay and discharge all the just debts of the said William Wilcox, due and owing at the time of his decease, and after payment thereof, then in trust, to pay unto Dinah Stocker and Barbara Darley, both of Portsmouth Common, spinsters, late servants of the said William Wilcox, deceased (also defendants) one annuity of 10*l.* 8*s.* each, to be paid to them or their assigns quarterly, during their respective natural lives, to commence from the 29th of September then next ensuing; and also in trust to pay to the said John Wilcox and his assigns one annuity of fifty-two pounds, to be paid him by weekly payments, at and after the rate of twenty shillings a week, for and during the term of his natural life, clear of all deductions, to commence from the day of the date thereof, and from and after payment of the said debts, and the said three several annuities, in trust for the said James and John Middleton, their heirs, executors, administrators, and assigns for ever, as tenants in common, and not as joint tenants; and to and for no other use and purpose whatsoever. And the said John Wilcox, for the considerations and purposes aforesaid, did thereby impower the said James and John Middleton to recover and receive all such sum and sums of money as were due and owing to him as administrator as aforesaid: and the said John Wilcox for himself, his heirs, executors, and administrators, did thereby covenant and agree to, and with the said James and John Middleton, their heirs, executors, and administrators, that they the said James and John Middleton, their heirs, &c. should, and might from thenceforth peaceably and quietly enter into, have, hold, use, occupy, possess, and enjoy the said tenement and premises, goods, chattels, and personal estate and

effects, and receive and take the rents, issues, and profits thereof without the lawful let, suit, trouble, or interruption of the said John Wilcox, his heirs, executors, administrator, or assigns, or any other person or persons lawfully claiming or to claim, by, from, or under him or them.

This deed was attested by Edward Hunt, Mary Ridge, and Thomas Grant, all three persons of undoubted credit, all of whom had been well acquainted with William Wilcox; but they were all three total strangers to John Wilcox, never having seen him before the time of the execution of the deed. The account given by Edward Hunt of the behaviour of John Wilcox at the time of the execution was, that the deed was carefully and deliberately read over to the said John Wilcox before he executed it, and deponent believed he approved of it; and that he freely, willingly, and deliberately executed it; and that he was in deponent's judgment and belief at the time he executed it, of sound mind, memory, and understanding, and in the possession and enjoyment of his right senses, and perfectly understood what he was doing when he executed it, and that he appeared to deponent to be in the same situation with respect to his health and constitution as persons at an advanced period of life usually are, and did not remark any particular appearance to induce him to form a contrary opinion: and the deponent added that he was sent for (as he believed) by John Wilcox to attend the execution of such deed, and that John Wilcox after it was executed returned him thanks for his attendance, and before he executed it he declared in deponent's presence, and in the presence of the other witnesses, that he had received great kindnesses and civilities from defendants Middletons, and that he was perfectly satisfied and happy in executing the same. Mary Ridge and Thomas Grant were also examined, and deposed to the same effect, though not so fully.

Defendants admitted by their answer, that the value of the real estates was about fifty pounds *per annum*, and the personal estate 2095*l.* including 1250*l.* for which the long annuities were sold: they also admitted that James Middle-

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ton prepared the draft, and John Middleton engrossed the deed, and that it was shewn to nobody, on the part of John Wilcox; that there were no written instructions given by John Wilcox, and that only one part was executed, which the defendants had.

The day after the execution of the deed, on their return from Portsmouth to Ringwood, it appeared they stopped at Winchester, and then the defendants executed a bond to John Wilcox to secure the payment of the twenty shillings per week.

Defendants being apprehensive that the real estates were not sufficiently conveyed by the said deed, John Wilcox afterwards executed deeds of lease and release, bearing date the third and fourth days of September 1776, and made between said John Wilcox of the one part, and defendants of the other, whereby after reciting the said deed of gift, and that the said John Wilcox, in order to vest the freehold and inheritance of said freehold tenements and premises in said defendants and their respective heirs, and further to manifest and support their title to the same, had agreed to grant and convey said freehold tenements and premises unto said defendants; the said John Wilcox did for the purposes aforesaid, and in consideration of ten shillings to him in hand paid by said defendants, grant, bargain, and release to said defendants, their heirs, and assigns the said several premises, together with all deeds, evidences, and writings touching or concerning the premises, or any part thereof, to hold to the said defendants, their heirs, and assigns for ever, as tenants in common, and subject to the trusts mentioned and declared in the said deed of gift.

On the 7th of September John Wilcox surrendered the copyhold estates to defendants and their heirs, as tenants in common, subject to the trusts mentioned and declared in the said deed of gift.

John Wilcox lived only two years after the execution of the deeds, and after his death the present plaintiffs, who were his nieces and co-heiresses, and next of kin, filed this bill to set aside all these deeds.

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Lord Chancellor.—This cause was opened as a transaction of fraud, and a great deal of argument has been used to impute to the character of the persons concerned that sort of foulness and baseness of mind which goes beyond the transaction itself: and I have been anxious to hear it out, chiefly on account of that imputation, not from any doubt I have entertained on the case from the beginning to the end of it. The characters of those concerned in a transaction of this sort must be decided upon singly, by those pertinent allegations and express proofs that are made in the course of the cause. It is impossible to go out of it; the court cannot receive such allegations or admit of such proofs as are not in the course of the cause: for if my private persuasion is, that none of that imputation does belong to the defendants in this business, yet that must not operate; every man must come before me to be tried for what he has done in the transaction; it would be frivolous and useless to justice to do otherwise. It is a sort of hardship upon those who have a fair and honourable character, and a sort of advantage to those who have a character of a different nature; and I am ready to declare it has been a disadvantage to the present defendants, for I believe they stand very fair in the world. The principal question here is, whether this be a sort of transaction which it is possible for a court of equity, consistent with its rules and principles, and the land-marks of its authority for ages together, to admit of standing. In order to examine that, you had better strip the case of foreign circumstances, and consider precisely on what it stands. The first question is upon the actual state and condition of the person supposed to be over-reached. Upon that head there is a discordance, rather than a contrariety, of testimony; nor have I been able to invent any one, two, or three issues, that would either turn the fate of the present question, or make a material ingredient in the decison. First, with respect to his state of mind, this seems clear from all the evidence; that he had been during the course of a very long life a man extremely dissipated in his habits, marked with very silly extravagancies, such as to make him the butt of

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genuine ridicule amongst the boys and people where he lived. His habit of life was such that those relations of his who thought proper to be good to him, never imagined any other kind of bounty than that which was to be dispensed to him week by week, purely for the purpose of maintaining him. The Middletons seem to have treated him with more tenderness than his cousin, or any other relations, and he contracted for them a degree of affection superior, and marked to be superior, to any other persons whatsoever; a degree of affection that would have made any bounty, which he had thought proper to bestow on them under proper circumstances, intelligible enough, and nobody would have doubted the reason that operated on his mind. The witnesses on the part of the defendants have spoken with a considerable degree of zeal to exalt this man's character beyond the mark; it is plain there is no good sense in it; but they have established his character to my apprehension out of the reach of any thing imputed to him by the plaintiffs. They describe him as a man of understanding sufficient for those ordinary affairs that his habits of his life put under his observation and judgment; they have likewise given him affections and aversions, perhaps too warm, but sufficiently distinct; they therefore have made him that sort of person who might be supposed to have competently effected such a purpose, and have given a bounty to defendants without any kind of impeachment. At the same time to suppose that his understanding was of a size beyond that, is contrary to what they have all said; drunk as often as he could contrive to be so, and then possessing an understanding much like all other men who have this infirmity: yet all speak from little circumstances which go sufficiently to prove the real character of the man. Those who call him crazy, if they speak in reference to those silly absurdities and marked peculiarities which do not fall upon the ordinary run of men, speak fairly, so far as they speak, but not so pertinently as they would have done if they had spoke to the point of his being capable of imposition; but what goes most to my mind is the evidence of those witnesses that speak of him

as a worn-out man, and as a character that they would not have accepted any thing from, because of the danger of impeachment. Two of the witnesses speak of him so, and thought it would not be looked upon in a proper light for them to accept a bounty from him, and that the rate and figure of his understanding would have impeached the fairness and delicacy of such transaction. This is the general habit of the man as it stands upon the evidence. An issue was desired; an issue to be taken on so uncertain a subject seems to me to bring very little light or information to the court: it would be impossible for a jury to mark the shades of his incapacity by any possible indorsement. If the question was whether his understanding was so depraved that he was incapable of executing a deed, that would be a proper question for a jury. My opinion is, that he was not so incapable, and that he might have made an instrument unimpeached both in law and equity, if all the circumstances attending the making the instrument had been such as the rules and principles of a court of equity would have admitted. Let us now a little consider the peculiar situation in which he stood at the time when this transaction happened. It is clear he had formed no expectations from his cousin by will, and no expectations at all equivalent to what the law would do for him, if there was no will. The cousin died somewhat suddenly at Portsmouth. A Mr. Binsteed, an intimate friend of the cousin's, sent over notice to Willes, an attorney at Ringwood, with a view to its being communicated to the Middletons. This has been represented as a sort of confederacy; but it seems to me to be perfectly clear and fair; it only goes to prove that those who knew William Wilcox most, thought that he would entertain a partiality for the family of the Middletons; so that proves for them instead of against them. Binsteed having found no will, and the Middletons having therefore reason to suppose that no will existed, they took along with them his next of kin; and very properly. The connection they had with him before made it an easy matter for them to

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derive to themselves all the confidence which he was capable of reposing in any body. He had led a life of absolute poverty; he was come to a fortune which to him was immense. It was an influx of prosperity of which he had no adequate idea as to measuring the parts or arranging the business of it: he therefore reposed the confidence absolutely in the Middletons. This seems a fair account of their going to Portsmouth. If the Middletons had considered it merely as going there to do business for him, it does not appear to me necessary that both should have gone; one wonders that both went, unless it was that they conceived the fortune of this man was to be divided between them, and therefore they were both to go to see fair play. Much has been said on the circumstance of their taking out letters of administration, and about the oath that there was no will; but I think there is nothing in that; there was reason enough to believe there was no will; but it seemed to me a little surprising they should take out a diocesan administration, when probably they must know (as it afterward turned out) it was necessary to have a prerogative one. This was inadvertence or ignorance, or what is more probable, a wish to establish the title as soon as possible, to make that use of it which they afterwards made. The only reason that arises in my mind to connect it with the proceedings that followed is, that there might be no delay in getting all that he was to succeed to in this manner, vested in him. They accordingly proceeded to Portsmouth. All that appears is, that the Middletons were in possession of the house, and money, and furniture, in which they did very properly: the unbounded confidence they received from him made it a matter of course. The only thing besides appears by Collins's evidence, and I have no doubt of the fairness and clearness of his testimony: by that it appears that the two Middletons had in fact made a will for him, and by that will, according to the general representation of it, they had given every thing to themselves. What am I to infer from this? Why, that they understood

that the confidence which this man reposed in them was such that they thought themselves at liberty to dispose of an instrument they had made for him, and that there would be no difficulty in getting any disposition of his fortune which they thought fit. The letters of administration from the prerogative court were not at Portsmouth at the time when it was thought necessary that this deed should be executed. Therefore in confidence that such letters of administration were coming down they took a deed from him dated the 20th of August, which is while the general transaction of his affairs was in their hands. The deed was executed in the presence of three very creditable witnesses; two of them had been much acquainted with William Wilcox during his life, and the observation made upon it was very fair, that if they had attempted to impose on him, they would not have chosen witnesses who from their habit of life were likely to be acquainted with William's disposition towards the Middletons. From their testimony it appears to have been a deliberate transaction. The deed itself proceeds upon a general notion that he thought himself bound to execute the intentions of his cousin; but it is clear also, that he had no obligation to his cousin; the fortune devolved upon him for want of his cousin's having disposed of it otherwise. After having taken that general purpose up, the first recitals are, "Whereas the cousin died," &c.—"And whereas John Wilcox being perfectly satisfied &c, and the said John Wilcox being at this time very old and infirm, so as not to be able to manage and transact his own affairs," &c. Now what evidence has been given of any intentions of William in his lifetime? The witnesses examined to the execution of the deed have never been asked the question (for I have looked into the interrogaties); yet the argument is that they were sent for as most likely to know it. If the deed is to stand as an evidence of his mind, the fact ought to have been proved that such declarations had been made. Again, the effect of this deed is, first, to provide for the payment of his debts, next of two annuities to the two maids of William, of 10*l.* 8*s.* each; of which intention, on the part of the cousin, there is not a spark of evi-

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dence: and yet the intention of the cousin, if he had lived to make a will, is the express foundation of this deed. Then there comes, after expressing particular inducements which led him to this deed, a general clause for five shillings, and for love and affection, &c. and all the clauses that can be put in to raise uses, and then he gives them his lands. I am puzzled about that. I cannot imagine why, when it was intended he should give them his lands, he should not execute a deed with all those formalities which all the practisers know by routine, as well as the most learned lawyer does by principle; and why not surrender the copyholds, and convey them in a proper manner? It appears the most informal, precipitate, and hurrying transaction to get out of him, as well as they could, on the stroke of the moment, what he was possessed of: then there comes another sweeping clause, all his household goods, &c. The first trust is for the payment of debts. The second for payment of the two annuities to the maids; then for payment of an annuity of 52*l.* to John, at twenty shillings a week. The idea, therefore, that they entertained of him is doubly implied: for this mode of payment shews they considered him as old and infirm, and not fit to be trusted with money. They make him covenant for quiet enjoyment; but that I take not to have much malice in it; it is an old covenant in a deed of gift, and seems to have very little effect. The argument as to the consideration is nothing, nobody pretends to say there was any consideration for it. It all turns upon this, whether he meant an act of sheer and absolute bounty to them, influenced by his cousin's intention, as expressed in the deed. After what I have stated, it seems to me somewhat difficult to conceive that the thing proceeded in his mind, step by step, in the manner they have mentioned. The witnesses only wanted to know, whether he intended to give all he had to these men; if he did, they did not care for the motives of it. Thus it stands on the first deed of the 20th of August. It has been argued as if it was necessary to establish an incompetency in this man that rendered it impossible for him to convey; but this is not so. There

are many instances where this court is obliged to act for the preservation of mankind. The presumptions arising must be at least refuted by the strongest evidence; but I am not satisfied at this moment it will bear any such refutation. The case of *Woodhouse v. Shipley*, 2 *Atk.* 535, was of this kind; nothing could be fairer; but the court decided on general principles, and could not permit a marriage to be the foundation of such a contract. What is the case of expectant children anticipating gifts by sales? They go upon general ideas. So the cases of trustees and guardians; and so of attornies. The case of *Pierse* v. *Waring*, (*a*) for instance. The court would not have set aside the gift in that case, but because it was a pernicious thing that a man who had the relation of guardian, and the confidence that relation derives to him, should avail himself of the habits of intimacy and influence (the true honest and just influence as it is in itself) he might have in the mind of an infant or child coming of age, to obtain from him a gift of that kind. In the case of attornies, it is perfectly well known that an attorney cannot take a gift while the client is in his hands, nor instead of his bill. And there would be no bounds to the crushing influence of the power of an attorney who has the affairs of a man in his hands, if it was not so: but once extricate him, and it may be otherwise. The case of *Proof* and *Hines* (*b*) is in this point; and though it was said there were other considerations in that case, it was decided entirely on the general principle. Compare those principles and the rules to be drawn from them with this case. Here you will find these people were to manage every thing for him, when he had no positive knowledge of the object itself, or the means of acquiring that object without their assistance. The letters of administration were not then obtained. In this condition they make the conveyance to themselves. Was the amount of the debts settled at that time? Why, suppose the fund had not been sufficient to pay the debts and annuities to the maids, nothing but the residue would have been open to

(*a*) Cited in 1 Vez. 380. 2 Vez. 548. (*b*) Ca. temp. Talbot, 111.

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this man, for he postponed himself to all the rest. Then there was no counterpart. The man who took the 52*l.* per annum had no counterpart, no copy, no previous instructions: it flowed entirely, as it should seem, from the will of the drawer; but leaving him in that condition without a title, it was necessary he should give them a title, and at Ringwood a title is made and witnessed by Willes, and they gave him a letter of attorney to execute, to be admitted to the copyhold, and to sell the stocks. The evidence upon this is, that the attorney that drew the deed did not know the nature of the estates till the 28th of August. That is the first time that they drew a single instrument that is apposite, and yet I am to imagine that this man had a full knowledge of his affairs, and that his mind operated upon it, when the best evidence is that none of them knew the real state of the property; they wanted to get all, but none of them knew what it was till they came to make instruments, which were to be adapted to the nature of the property. Resting here, it appears to be so clearly within the cases that have happened before, that I can have no doubt about it; but it does not rest here (it is said), because he expressed the same affections towards the defendants, and continued to entertain them. I have no doubt of his having expressed himself to be perfectly satisfied with what he had done. First, had he any means to alter it? Was it ever put in his power to alter it? Next, was he ever sufficiently acquainted with the nature of the estate, or the extent or value of it, or the nature of the deeds to form an idea on a transaction of this kind? Whatever may be in proof with respect to the general circumstance of the fairness of the conduct of the Middletons, whatever they may have believed in their consciences, that this man would have done for them, if it had been in his choice, that is not the case. In this particular instance they have taken the property; perhaps bluntly and inadvertently; but that is too far out of the sight of a court of justice. I therefore set these deeds aside, entirely upon the grounds I have before stated, and without reference to the fairness of the characters of the defendants in

any respect whatever; but the deeds must be set aside; and they must deliver them up to be cancelled as the Master shall direct, and account with the plaintiffs for the rents and profits of the real estates, and convey and surrender them to the plaintiffs at their own expense, and also account for the personal estate, and pay interest for it. *Welles v. Middleton.*

After some hesitation the *Lord Chancellor* said he thought the plaintiffs had got enough *without* costs.

From this decree the defendants appealed to the House of Lords and assigned the following reasons,

First, Because, at the hearing in the court below, the case of *Pierce* and *Waring*, as set forth in 1 *Ves.* 280, was principally relied on; but in 2 *Ves.* 260 and 548, the circumstances upon which Lord *Hardwicke* determined that case are more fully stated; and it is humbly submitted, that the situation of the Middletons does not comprehend them within the doctrine contained in that case, or any other which has been quoted against them. This was no transaction between attornies and their client, or a person who confided in them as attornies; they were all relations, between whom good offices, attachment, and affection had for a number of years subsisted.

Second, Because courts of justice not being able to dive into motives, liberally construe beneficent acts of one relation to another.

Third, Because there is no proof of any kind against the appellants, Stocker and Darley; and from the testimony of Thomas Parsons it is manifest that John Wilcox was convinced of the rectitude of his provision for them.

Fourth, Because it may reasonably be presumed that John Wilcox reflecting in his mind upon the age he had attained, and being in a habit of living which at his time of life he was unwilling to alter; and feeling powerfully the regard he had for the Middletons, and grateful to them for their act of kindness and humanity to him, determined to make the deed of gift at once to mark his gratitude, and as an act of piety in fulfilling what he believed were the intentions of William Wilcox in their favour.

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Fifth, Because what he said at the time of executing the deed of gift, and his declarations after it was executed, prove, that he had in fact adopted these proper sentiments.

The reasons in the Respondents case were,

First, Because it is a rule established in courts of equity, that no gift or gratuity to an attorney (beyond his fair professional demands) made during the time he continues to conduct or manage the affairs of the donor, more especially if such gift or gratuity arises immediately out of the subject then under the conduct or management of the attorney, shall be permitted to stand. In the present case the transaction is, on all hands, acknowledged to be a gift. It is equally clear, that it was a gift made to *attornies* then acting on the part of the *donor* in the management of the very property given, and a gift of property, the nature or amount of which the donor did not know.

Secondly, Fraud which is implied in the cases alluded to, is in the present case proved by the strongest circumstantial evidence, arising as well upon the face of the deed of the 20th of August as from extrinsic facts. The design of the appellants shewed itself from the moment that the news of William Wilcox's death arrived at Ringwood, by the appellant James Middleton sending for John Wilcox, and his brother joining the party. The uncommon precipitation with which they carried him to Portsmouth, the taking out letters of administration from the Diocesan Court on the Sunday, before it could be known whether any will existed, are circumstances not to be accounted for, if done by a mere attorney, or a disinterested person; but are easily reconciled to the anxiety of men pursuing their object by indirect means, and aware of the danger of their design being circumvented by delay or the interference of disinterested persons. As to John Wilcox, they seem to have a firm reliance on the influence they had over him, as appears by the conversation they had with James Collins in respect of the will; the draft of which they had prepared for John Wilcox without any previous communication with him upon the subject, and which they afterwards abandoned professedly on account of the revocable nature

of the instrument. The deed of the 20th of August is a general sweeping gift of all the property freehold, copyhold, and personal, without specification of particulars or value, drawn and indorsed by the appellants, without the advice, perusal, or knowledge of any third person on the part of John Wilcox, and that at a time when it was scarcely possible, that either John Wilcox or the appellants themselves could be informed of all the particulars of the intestate's personal estate, and especially of his money in the public funds. Now is there any pretence on the part of the appellants of any account having been delivered to John Wilcox, by which he could form any idea of the amount of what he had acquired by William's death? The recitals of the intentions of William Wilcox in favor of the appellants, and the desire of John to effectuate those intentions (which indeed the appellants had made their main ground of defence) is wholly unsupported by evidence of any kind. The three witnesses (who are undoubtedly persons of credit, and who are very circumstantial in the account they give of what passed at that time) are totally silent as to any such motives being then mentioned by any body; and it is further remarkable, that the three witnesses having been intimately acquainted with William Wilcox in his lifetime (and chosen by the appellants to attest the execution of the deed for that express reason) must have known the intentions of William Wilcox in favour of the appellants (if they in fact existed); and yet nothing of this nature appears in any part of their depositions; and indeed the appellants have not ventured, by their interrogatories, to ask any one of them a single question upon the subject. Further, as to the recital in the deed of the age and infirmities of John Wilcox, and his being incapable to manage his affairs, the appellants, finding it did not well accord with the rest of their case, have thought fit, by their answer, to give a flat contradiction to their own assertion. No counterpart or copy of the deed was delivered to John Wilcox; the annuity of 52*l.* per annum was not one third of the income of the property conveyed, and was secured to him only by the bond of the two appellants;

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it was posponed in the trusts of the deed, to the two annuities granted to the maid servants, so that for any care the appellants took to the contrary, if they had become insolvent, or the estates had turned out insufficient, he might have been again a beggar, seeing his property out of his own reach, in the hands of other people, and the maid servants, who were supposed to be the objects of his bounty, enjoying his property in preference to himself during his own lifetime.

Third, Whether his understanding shall be considered, as naturally deficient, or as worn out by age or vitiated by intemperance; in either case the character of this man was not such as to uphold in a court of equity, a voluntary gift of his whole property, two thirds immediately, and the remainder at his death, without any power of revocation or controul. The transaction itself was much beyond the scope of his ideas, and the habits of his life. The small allowance upon which John Wilcox subsisted previously to the death of William, being particularly directed by those relations from whom it came, to be paid to him *weekly*, and the same mode of payment being adopted by the appellants in repect of the annuity reserved to him by the deed of gift, mark very strongly the opinion of his own family, and of the appellants themselves, that he was utterly unfit to be trusted with the care of money; so that if he had known the amount of his fortune, which he clearly did not, he could not have been competent to determine for himself in such a transaction.

Fourth, The appellants rest much upon the satisfaction said to be expressed by John Wilcox in his lifetime, as the acts done by him in the appellant's favour. These expressions, if uncontradicted (which is by no means the case,) would not impeach the case made by the respondents upon any of the grounds above mentioned. If the transaction was vitiated by the state of mind of John Wilcox, his subsequent declarations cannot have much weight; if by the undue influence of the appellants, or their actual misrepresentation, or wilful concealment in respect of the value of the property in question, both which may be here fairly

presumed, these declarations will apply only to what he thought he had done, and not to what he had done in fact. Nor will the subsequent indentures of lease and release, the surrender of the copyholds, or the execution of the letters of attorney, vary the case in the appellant's favour: they must be considered as only parts of a transaction bad in *toto*, and therefore cannot be taken singly so as to make the case less liable to objection.

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This appeal was argued before the House of Lords on the 6th of June 1785, when their Lordships dismissed the appeal, and affirmed the decree therein complained of. *4 B. P. C.*

In Lincoln's Inn Hall, Lord Chancellor. July 16, 1784.

HARRINGTON *versus* HARTE.

Where a person has an absolute and general power of appointing a fund as well in his lifetime as at his death and there is no gift over, yet if no appointment be made, his administrator cannot claim the fund, and even creditors will not be entitled to the benefit of it without some step taken towards an appointment; though where any such appointment be made the court will arrest the fund *in transitu* for

Jane Hollings made her will of the 9th of May 1744, and thereby gave the residue of her personal estate to her executors in trust to lay the same out in some of the public funds, and to pay and apply the same to such uses and purposes as her daughter Jane, wife of Arthur Champernowne, should by any writing signed and executed in manner therein mentioned, notwithstanding her coverture, direct and appoint, and in the mean time and until such appointment, to pay the interest and dividends thereof to such persons or persons as her said daughter should in like manner direct and appoint, and for want of such appointment to her said daughter for her separate use; and after the death of her said daughter Jane Champernowne, in trust for such person or persons and in such shares and proportions, and to be paid at such times as her said daughter, whether sole or coverte, by any deed or writing under her hand and seal, or by her last will and testament, or any writing purporting to be her last will and testament, should order, direct, and appoint; and in default of such appointment, in trust for such person or persons as would then, by virtue of the statute of distribu-

Harington v. *Harte.*

tions of intestate estates, be entitled to her (the testatrix's) personal estate in case she had died intestate.

Jane Champernowne made no appointment. Plaintiff, as administrator of Jane, insisted, that by the words of this will she had so absolute a power and control over this fund, that the whole property in it vested in her, and he therefore claimed to be entitled to it as her administrator; and in support of this claim were recited *Gray* v. *Montagu*, 6 *Bro. P. C.* 429. *Baintun* v. *Ward*, 2 *Atk.* 172. *Troughton* v. *Troughton*, 3 *Atk.* 656. and *Elton* v. *Shepherd* before Sir *Thomas Sewell*, *Master of the Rolls*, 18th June 1781, in which case no creditors were concerned; but there was no limitation over in default of appointment. And in the present case it was insisted, that the limitations over being to such persons as would be entitled under the statute of distributions in fact amounted to nothing, as the law would give it so otherwise.

the benefit of creditors:

A fund is given after the death of J. H. to such persons as J. H. shall appoint, and in default of appointment to "such persons as would *then* by virtue of the statute of distributions be entitled to the testator's personal estate, in case he had died intestate:

There being no appointment the funds shall go to such persons as were the next of kin of the testator at *the time of his death.*

The *Lord Chancellor* said, that in favor of *creditors* this court would arrest the fund *in transitu*, where the person, who has the power of appointment, has taken any step to appoint or dispose of it; but he did not know of any case where that had been done, even for the creditors, if the party himself had taken no such step. In the present case he was clear, plaintiff was not entitled, and that it must go to the testatrix's next of kin.

Another point was made by the pleadings, viz. Whether this fund should go to such persons as were next of kin to the testatrix at the time of her death, or such as were so at the death of Jane Champernowne, which turned on the construction of the word "then;" but defendant's counsel gave up the point, and admitted that the word "then" was to be taken as an adverb of relation, and not of time, and it must therefore go to such persons as were next of kin to testatrix at the time of her death.

STUBBS *versus* LEIGH.

In Lincoln's Inn Hall. July 29th 1784.

Bill filed by administrator *durante minore ætate*. Just before the hearing of the cause, the infant attained the age of 21. In this case (the *Lord Chancellor* said) there is no way of avoiding the necessity of filing a supplemental bill. And the cause was therefore struck out.

DESCRAMBES *versus* TOMKINS.

In Lincoln's Inn Hall. Aug. 5th, 1784.

PETITION.

Testator gave by will to A. B. C. D. and E. 500*l.* each, to be paid to them at their respective ages of 23 years, and if they should die before that time then their respective legacies were to sink into the residue of the personal estate. The five legatees were in reality maternal grand-children of the testator, though not so described in the will. Their father was alive, but in very bad circumstances; and it was prayed by the present petition, that the five legatees might be allowed interest upon their respective legacies until they attained 23 years, and that such interest might be paid to the father, for their maintenance in the mean time. And *Price* in support of the petition cited 1 *Cha. Rep.* 140. *Harvey* v. *Harvey*, 2 *Wms.* 21. *Acherley* v. *Vernon*, 1 *Will.* 783, *Nichols* v. *Osborne*, 2 *Will.* 419. *Taylor* v. *Johnson*, 2 *Will.* 504.

Testator gave to A. B. C. D. and E. 500*l.* each to be paid to them at their respective ages of 23 years; and if they should die before that time, then their respective legacies were to sink into the residue of his personal estate.

Lord Chancellor.—The case of *Nichols* v. *Osborne* is the only case applicable to this, and that is rather a case of a present gift with an executory devise on it; and the difference is where the legacy is given presently, but if the legatees shall die before a certain time then over, and where it is given at a future time, as in this case. No interest can be allowed in this case.

These legacies do not carry interest, and no maintenance can be allowed to the legatees.

Thruston v Audley 27 Beav. 336.

In Lincoln's Inn Hall. Lord Chancellor. Oct. 30, 1784.

HALL *versus* HALLET.

ON FURTHER DIRECTIONS.

Where an executor appears to have made 5*l.* per cent. of the assets in his hands, or where he has by the non application of assets done damage to the estate to the amount of 5*l.* per cent. in either case he shall be charged with interest at that rate, and therefore where he permits debts carrying interest at 5*l.* per cent. to run on when he had in his hands a fund to pay them, he shall *eâ ratione* pay interest at that rate. But where it appears only that the executor retained the assets for his own purposes, he shall answer interest at 4 per cent. An executor shall not be permitted,

This bill was filed by Humphrey Hall, one of the younger children of J. Hall deceased, and Administrator of the goods and chattels of his father unadministered by J. Hallet deceased, who had taken out letters of administration of Hall's estate, against Elizabeth Hallet, widow and executrix of J. Hallet, and against Charles Scrase, who had been employed by Hallet as an attorney in the management of all Hall's affairs, and who was also a purchaser of some parts of Hall's personalty from Hallet, and the other younger children of Hall were also made defendants. The bill charged Hallet and Scrase with very gross misconduct and mismanagement in the administration of Hall's affairs. And upon hearing the cause very particular directions were given to the Master, in the reference made to him, to inquire into the several circumstances of the transaction, and the Master having in consequence of this reference made a full and very long report of all the particulars, the cause now came on for further directions on this report. The points chiefly made on the part of the plaintiff were, first, to charge Hallet with interest for the money retained after all the debts were satisfied, and also for the several sums which he had from time to time kept in his hands unapplied, while interest was running on several large debts by specialty, and under several other circumstances of great neglect and mismanagement which the *Lord Chancellor* more fully adverts to in his decree. Plaintiff also insisted on setting aside a pretended sale of two shares in some Scotch mines, from Hallet to Scrase for 150*l.* each, (one of which appeared to have been bought by Scrase, on Hallet's own account) as being sold at a great undervalue, or at least that they were rising very rapidly in value at the time, and that there was then no necessity for selling

Mark. 4. 40 & Ironmonks &c v Grave 12 P. D. 746

them; and it appears that in fact they did rise from year to year in value, till they arrived in the year 1765 (which was about 15 years afterwards) to be worth upwards of 1600*l.* each; but it also appeared that, at the time they were sold, they were in fact sold at the market price.

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either immediately or by means of a trustee, to be the purchaser from himself of any part of the assets, but shall be considered a trustee for the persons interested in the estate, and shall account for the utmost extent of advantage made by him of the subject so purchased. Upon the principles of policy no attorney shall be permitted to purchase any thing in litigation, of which litigation he has the management.

Another point insisted upon by plaintiff was to make Scrase account for two debts due to Hall's estate, amounting to 670*l.* which had been assigned to him by Hallet for a sum of 300*l.* only.

The chief defence relied upon by defendant was the great length of time which had elapsed since this transaction, and (especially as Hallet was now dead) the difficulty attending the explanation of it by his representations. The material dates in the case, were as follows: Hall died 26th July 1748; on the 7th December 1748, Hallet took out letters of administration; in July 1758, Hallet had satisfied or compounded all Hall's debts; in 1759 present plaintiff came of age; this bill was filed in 1766; the cause was heard in 1768.

Lord Chancellor.—With respect to what has been said in this cause, as to the effect of the length of time which the plaintiff has suffered to elapse without prosecuting his claims, to be sure no one demand which he had could be stopped by the length of time; but yet when the delay arises from the person who suffers by that delay, it tends to suppress the suspicions which might otherwise arise on the conduct of the other party. Now this is exactly the case of the present plaintiff: above twenty years since he might and ought to have had a final decree; under these circumstances he cannot have those advantages and that assistance in inquiring into facts which he otherwise might have had, though this is not settled by any established rule or positive decision of the court, but it is the result from common sense, and the nature of evidence. I believe there never appeared a case in which an executor and his agent behaved worse than in the present. In July 1748 Hall died; he was in his lifetime husband of several East India ships, and was otherwise in a very extensive and complicated business; his circumstances, considering the extent of his

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concerns, were far from being in a good condition: on his death his creditors were called together; but no steps were taken to arrange his affairs till December 1748. It does not appear clearly what the step was that was then taken, but it appears, by an opinion of Sir Dudley Ryder respecting his affairs, that something was then done. This helpless family applied to Hallet first to be guardian of the children: the eldest was then about 10 years old, and there were 5 or 6 others. Hallet afterwards took out letters of administration to Hall, and his first act as administrator was this, he was in right of his wife entitled to one-third part of the estates of one Pinnell, to whom Hall was indebted to the amount of 7227*l.* The advice he took and the plan he pursued was to endeavour to get a priority established in favour of Pinnell's claim on Hall's estate. To be sure this could be no fraud or even injury to Hall's children, for as to them it was very immaterial which debt had the priority; but however Hallet's practice was uncommonly sharp, for as administrator of Hall he was sued by himself, as being interested in the estate of Pinnel: on the 7th December, 1748, he took out letters of administration; the very same day the bill was filed against him by his own direction and for his own benefit (though of course not in his own name); on the 8th (the next day) he puts in a full answer and admits every thing; and on the 9th, a final decree was obtained for the whole sum: he then proceeds to make sale of different parts of the personal estate of Hallet to the amount of 15000*l.* and upwards, and there being then debts of Hall's on mortgage bonds, &c. all carrying interest, he nevertheless keeps the whole of this money in his hands and lets the interest run on the debts in the mean time. So things rested till the year 1752; he then paid himself 7000*l.* in part of the 7227*l.* due to Pinnell's estate, while debts of a superior nature were outstanding. It is taken notice of by the Master, in his report, that he might at this time have had an account taken of the whole of Hall's affairs and settled them at once. To this it is answered, on the other side, that that could not be, because in this particular suit he was pressed by

one creditor only for a single demand: but this is neither true in fact or in reason; for though that bill was filed in that shape, yet it is certainly true that another suit was at that time depending, in which the whole account might have been taken. It is also not true in reason; for, in fact, that very bill was filed by Hallet himself, and it never can be said that he was prevented by himself from doing justice. There were five or six other bills filed, which were all carried to a most unwarrantable length, without coming to this point, which they ought all to have tended to. Then it is said, that in 1758, when all the accounts were settled, every thing must be supposed to be right, because the creditors, who would naturally take care of themselves, were induced to come into a composition of 6*s.* 8*d.* in the pound, in consequence of what then appeared to be the situation of the affairs. But there were some extraordinary circumstances also in this part of the transaction; for one Glegg, who was alledged to be a creditor for 2,229*l.* signed the composition deed for 6*s.* 8*d.* in the pound, as a creditor for that sum. Every other creditor but himself signed a receipt for one-third part of their debts, but Glegg did not; and it appears that Glegg was actually paid 2000*l.* by Scrase. Here then appears a fraud in this very transaction, for Glegg was paid very nearly the whole of his debt, while the other creditors had but 6*s.* 8*d.* in the pound. So that these creditors, who are supposed to have taken care that Hallet had acted fairly, do not appear to have been very vigilant. But the matter does not rest here; for the Master finds that Hallet was at this very time in possession of 800*l.* beyond what he paid to the creditors, so they were here again deceived; but however it appears, that as to this money they have not thought fit to make any demand. Then the first order must be that this sum of 837*l.* 2*s.* must be paid into court. Several other questions must be made, and first as to interest. It has been contended, that an executor is not to be charged with interest for any money in his hands, unless it appears that he has employed it to advantage;

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but he might mismanage his testator's estate from many other sinister views, without any idea of immediate profit to himself. In this case it is extremely plain that the Master having reported so much money constantly in his hands (in consequence of the directions to him to make rests of the balance in Hallet's hands at the end of each year, and which was done with a view of ascertaining the extent of his misconduct), and Hallet having continued to pay interest on the specialty debts, without applying this money, this would fix him with interest without any further explanation. But this case goes further; for here it appears, that unless he had retained this money in his hands he would not have been able to have paid himself the 7000l. and that he retained it with this view. He therefore must pay interest for this money. As to the rate of interest I know of no rule of this court to charge him with 5 per cent. without making out a special case for the purpose. If the executor appears to have made five per cent. of the money, he shall be charged 5 per cent. *ea ratione*. So if it appears that he does damage to the estate to the amount of 5 per cent. he shall be charged with that rate, *ea ratione*. And in that view of the thing I shall make the present order, which is, that the Master must compute interest at the rate of 4 per cent. on the money in Hallet's hands generally; but where he has paid interest on debts at a higher rate, he shall be charged with interest at the same rate for so much. With regard to his conduct in getting in the debts due to Hall's estate, it appears he did not get them in the manner he did, for the purpose of paying the debts from the estate; for what he did get he did not apply in that manner. He sold many of the ships before their arrival, and before he could possibly know the most advantageous method of disposing of them. This could not be justified but upon a very pressing occasion. He was himself a ship's husband, and therefore conversant in the business; and yet he permitted some of the ships to remain 18, and 20, and 25 months in port unemployed after their arrival. Several of them were under mortgage, but

yet he continued to pay interest on these debts after the pledge was in his hands. This conduct is so gross, that if it were recent I should send it to the Master to inquire how much the estate was damnified by it; but in this case the length of time which has elapsed has made it impossible; for persons having claims of this kind cannot be permitted to rest 10 or 20 years, and then call upon representatives to explain the whole conduct of the orignal party; on this head therefore it is impossible to give the directions I otherwise should do. Then as to the Scotch adventures, early in the year 1749 Hallet sold these funds, having at that time in his hands greatly more than he thought proper to apply in payment of any debts. The Scotch adventures are said so have been at that time an increasing fund; but however the Master does not find them to have been worth more than 300*l.* The sale is a mock sale from Hallet to Scrase, one moiety of which is confessedly on the account of Hallet himself. Then the question is, whether this court will allow an executor to take to himself a part of his testator's estate at his own price; for Scrase is, in fact, nobody in the business. This appears to be within all the cases which are to be found in the books upon the subject, and it is perfectly clear that this court cannot regard such a transaction as a *res gesta*, or allow it to be treated as a real sale, and the consequence is, that it will turn Hallet and Scrase into trustees for the benefit of the family. The Master must therefore take an account of all sums of money received by Hallet in respect to the share which he had (but which he afterwards sold), and compute interest at 4 per cent. on all those sums of money; and must also compute interest at the same rate on the 150*l.* paid by Hallet for the share, which being deducted from the former, Hallet must be charged with what appears coming from him on that account. I do not know that the court has ever gone in these cases to the length of ordering the specific fund to be replaced. The rule goes to charging him with the utmost extent of advantage made by him of it, which in many cases would not be satisfied by the mere

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replacing of the specific thing. However, I take it the plaintiff has no such election as choosing between the specific thing, and the advantage made of it. As to the other share which Scrase kept, as that still remains in specie in his hands, it must be transferred with the same directions as to taking the account of interest. Next as to the debts assigned to Scrase; and this point is very plain; Hallet, after treating the estate of these infants in the manner he appears to have done, brings it to a conclusion in 1758, on which occasion he gets in the residue of the outstanding debts. After a recital that this assignment was made to Scrase, in consideration of his care and pains in the management of Hall's affairs (though Mr. Scrase appears to have been regularly paid from time to time his bills for law charges) Hallet assigns these two debts of 620*l.* and 50*l.* to him for a sum of 300*l.* But if it stood on the simple fact of the assignment, he never should be entitled to any advantage from it; for no attorney can be permitted to buy in things in a course of litigation, of which litigation he has the management. This the policy of justice will not endure. It is said that Lord *Camden* declared he saw no imputation of fraud either in the sale of the Scotch adventures, or in the assignment of the debts. I do not believe Lord *Camden* ever said so: though with regard to the Scotch adventures, I might agree in saying I could not impute a criminal intention in the transaction; but with regard to the assignment, I am perfectly clear in it, from the circumstances of his being an attorney. The remedy must be for the Master to give interest at 4 per cent. for the money really advanced by him, and for him to account for what he has received for the two debts, with interest at the same rate. I am not anxious to go into the circumstances of this business further than is necesary; but it would have been better if no attempt had been made to have proved this transaction beneficial to the estate, for it appears that these debts were by no means desperate or precarious.

The remaining consideration is as to costs. The general

rule is, that where one interested in an estate resorts to this court for an account of that estate, the costs fall on the estate; for executors usually are to be exempt from paying costs; and this rule holds even in cases where great delays and difficulties have been occasioned by the executor; for the court will overlook these circumstances if it can. But here are some articles on which the defendants must pay costs; as to the Scotch adventures and the assignment of the debts, they are clear violators of a trust, and they must therefore pay all the costs, except of taking the account of the estate.

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HOLWORTHY *versus* MORTLOCK AND FRANCIS.

In Linc. Inn Hall, Oct. 30, 1784. Lord Chancellor.

APPEAL.

Plaintiff on his coming of age came into possession of a landed estate in Cambridgeshire and Huntingdonshire, of about 1000*l.* per annum, of which one Hustwait had been appointed receiver by this court during plaintiff's minority. The plaintiff continued him afterwards as his bailiff or steward, and placed very great confidence in him. Hustwait having speculated very deeply in lottery tickets, and proving unfortunate, applied to plaintiff to become security for him to the amount of 2000*l.* and which plaintiff afterwards paid. Hustwait having continued unsuccessful, and lost further sums of money, applied to defendants (who were bankers at Cambridge, and with whom plaintiff kept money) to discount bills drawn by him on plaintiff to a very considerable amount, and to which he had put the plaintiff's initials as acceptor, without the knowledge or consent of plaintiff; but (as defendants insisted) under a general authority from plaintiff to accept bills for him. Hustwait's affairs growing worse and worse, he at last destroyed himself, and left a letter to de-

H. employed B. as his bailiff, and gave him a general authority to accept bills for him. B. accepted several bills without the knowledge of H. and discounted them at H. bankers, and applied the money to his own use; and then died. The bankers afterwards obtained a bond from H. for the balance of his account with them, including the

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several bills so accepted by B. On a bill filed to set aside this bond, as improperly obtained from H. the court directed the bankers to sue the plaintiffs at law on these bills. The bankers selected some of these bills on which they brought their actions, and which were just sufficient to cover their demand; but on the trial there appeared a receipt indorsed on one of them, and the jury for that reason gave a verdict against the bankers on that bill, and for them on all the rest.

There was no application for a new trial; but when the cause was set down again the bankers applied for an opportunity of proving their demand on some other of

fendants, in which he acknowledged that his whole transaction with them was without the privity of plaintiff. On notice of his death and receipt of this letter, defendants went over to the house of plaintiff, and insisted on his giving them a bond as a further security for what was due to them from Hustwait on the general balance of account. This, according to their calculation, amounted to something less than 2100*l.* and they immediately produced a bond for 2100*l.* which they prepared beforehand, and insisted on plaintiff signing it immediately, intimating at the same time that if he declined so doing, they should involve him in a very expensive law suit, which would cost him more money than the debt itself. He at first remonstrated with them, but was at last induced to execute the bond, which though it specified the sum of 2100*l.* yet was understood to be intended only to secure the balance due from Hustwait, whatever that might turn out to be. The present bill was filed to have the bond delivered up to plaintiff, as having been obtained from him by duress, and without consideration. The consideration insisted upon by defendants was the several bills (twelve in all) to which Hustwait had put plaintiff's initials, and by which signature defendants alleged the plaintiff was bound. On hearing the cause the *Master* of the *Rolls* directed the bill to be retained for a twelvemonth, with liberty for the defendants to sue plaintiff at law on these bills, or any of them. Defendants being advised to pick out so many of the bills as would just cover their demand, declared on five of these bills, amounting together to 2150*l.* And on the trial of the action the jury found for the present defendants (plaintiffs at law) on four of the bills, amounting to 1700*l.* considering present plaintiff as bound by Hustwait's acceptance; but on the fifth bill for 450*l.* there appeared to be a receipt indorsed, and for that reason the jury found for present plaintiff. Defendants made no application either at law or here for a new trial, but set down the cause for further directions before his Honour, and prayed they might be at liberty to go before the Master to prove that, in fact, the

fifth bill was not satisfied, and to explain the circumstance of the receipt being indorsed on it; but this his Honour would not allow them to do, and directed that on payment by plaintiff of 1700*l.* the bond and the notes should be delivered up to be cancelled. From this decree defendants appealed, and it was insisted for the appellants, that as they had, in fact, succeeded at law upon the only point which was intended to be tried, namely, whether the plaintiff was not in consequence of a general authority given by him, bound by the acceptance of Hustwait, although they were turned round by their own inadvertence, in selecting the wrong bills to declare upon, and not being prepared with evidence to explain the circumstance of the bill for 450*l.* having a receipt indorsed on it, yet they ought either before the Master, or by some new trial, to have an opportunity of rectifying their mistake. But at all events they were entitled to have the decree varied in one respect, which was, that instead of the bills being delivered up to be cancelled, plaintiff could only be entitled to an injunction to stay the defendants from proceeding against *him*, for they were most unquestionably entitled to retain them to enable them to proceed against Hustwait's estate, if they thought proper.

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the bills. But the court thought that the remedy (if any) must be by motion or petition for a new trial; but that under the circumstances of this case, the court would not be inclined to give any assistance to the bankers, towards rectifying the consequences of their own inadvertence.

Lord Chancellor.—The defendants, to be sure, are entitled to have the decree altered, so far as it directs the bills to be delivered up; and instead thereof I must direct a perpetual injunction in favour of plaintiff. But I think the decree in all other respects perfectly right. The defendants are not entitled to any relief in respect of the verdict against them on the 450*l.* bill: first, because if, in the course of an action brought under the direction of the court, the mode is misconceived, the party should apply by petition to enable the court to do perfect justice. But no petition has been preferred. They submit to the record, and set down the cause for further direction. And therefore without any suggestion on record, it cannot be admitted. But if application had been made to bring it on record, I believe it would be impossible to persuade

Vide *Kemp* v. *Mackarell*, 2 *Ves.* 579.

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any court of justice to give them relief; for it is perfectly clear the defendants had no hold whatever on plaintiff, but in consequence of his inadvertence in permitting his name to be made use of. There is no part of the transaction, from the beginning to the end, in which he had the least concern. It is proper to say there is no evidence to shew that the defendants knew Hustwait was cheating plaintiff, or that they were likely to take advantage of such a transaction if they did know it. Therefore I only charge them with inadvertence. But I do not think that at any rate it would have been proper to have permitted any further inquiry as to the bill of 450*l.* Then as to costs; I cannot charge the defendants with actual fraud; but they have totally failed on the broad ground of their defence, as being a transaction between plaintiff and them originally; for it is perfectly clear the plaintiff had no concern whatever in it. The defendants therefore must pay the costs.

On application by the appellants for the deposit, the decree having been varied, the *Lord Chancellor* said he would not give them the deposit, as he did not consider the decree as being varied at all materially.

In Court. Lord Chancellor. Nov. 13, 1784. Vide *Ante*, p 43.

BIRCH *versus* CORBIN.

Where money in the public funds is the subject of a suit, to which the Bank is made a defendant, the court will not on the application of the Bank make any order on the litigating

It was now moved by *Mr. Jackson* on the part of the defendants, the Governor and Company of the Bank, that the plaintiff might shew cause why he had not brought this cause to a hearing, or obtained an injunction to restrain the defendants Thomas, Richard, and Francis Corbin, from transferring the sum of 5000*l.* 4 per cent. annuities, and that defendants Thomas Corbin and Athawes might be restrained from proceeding in two actions brought by them in B. R. against the Bank for refusing to permit a transfer of the respective sums of 5000*l.* and 1200*l.* which the Bank had

done in consequence of the bill filed in this court; the Bank being ready to transfer under the directions of this court.

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But the *Lord Chancellor* thought it impossible to give the Bank any relief upon this kind of application, which was, in fact, giving plaintiff an injunction at the request of a defendant, and who, in fact, had no interest in the question. For to this purpose the Bank must be considered as a private person, who is a stake-holder, and as such is most certainly entitled, if they think proper, to file a bill of interpleader; but it is certainly necessary for them to apply in the shape of plaintiffs.

parties to restrain them from proceeding at law against the Bank to compel a transfer, but they must file a bill of interpleader.

At the Rolls. Dec. 3, 1784. Sir Lloyd Kenyon.

BONNEY *versus* RIDGARD.

Richard Watts made his will, dated 26th March 1746, and thereby gave to his wife Martha Watts (who afterwards married the defendant Ezra Ridgard), and to his three children, Mary Watts, Martha Elizabeth Watts, and Ann Watts, (who afterwards married the three plaintiffs, George Bonney, James Tomlinson, and William Selman) all his estates in Lewknor's-lane in the parish of St. Giles, and all his estate in the Mint in the parish of St. George Southwark, to be equally divided between his said wife and his three daughters, and he desired his said estate might be sold the first opportunity as his executors should think most proper; and after giving several specific legacies to his wife, he appointed Peter Theobald and his said wife Martha Watts to be his two executors to dispose of his said estates, goods, and chattels, according to the tenor of his said will.

Testator died 23d January following, and the defendant Martha, his widow, alone proved the will, and entered upon the premises in Lewknor's-lane and in the Mint, which were leasehold for long terms of years, great part of which were then unexpired. On 31st July 1748, the

A purchaser of leasehold premises from an executor need not (in general) see to the application of the purchase money, nor need there be any recital in such an assignment of the purpose for which it is sold; but if on the face of the assignment it appears to have been made in satisfaction of the private debt of the executor, such a sale is fraudulent against the persons inte-

Watkins v. Cheek. 2 Sim & St 199.
Greasley v. Hawley 4 Beav. 71. S. P.
Ridgway v. Bear 1 Beav. 486

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rested in the premises under the will, and a court of equity will relieve against it. But such a claim will be barred by a great length of time having run against the parties seeking relief.

widow Martha married the defendant Ezra Ridgard. Soon afterwards Ridgard and his wife joined in making a mortgage of the premises to a Mrs. Mascal, and in 1752 they joined in assigning the equity of redemption to the defendant Noah Barnard in consideration of 350*l.* which was made up of 217*l.* due for principal and interest on bond from *Ezra Ridgard* to Barnard, 127*l.* on simple contract, and 6*l.* in hand paid at the time of the assignment, and the deed contained recitals of these debts from Ridgard to Barnard. Barnard afterwards sold the premises, and he and his vendees had continued in possession of the premises from the year 1752 to the present time. The youngest of the testator's daughters came of age in 1764.

The present bill was filed against the several defendants Ridgard and his wife, and Bernard and his vendee, for an account of the rents and profits of these leasehold premises, and that plaintiffs might be let into possession of their respective shares of the rents and profits thereof, &c.

This cause came on to be heard before his late Honour *Sir Thomas Sewell*, 11th March 1783, when the question being made, whether, under the circumstances of this sale, the defendants should not be considered as trustees for the plaintiffs in respect of their interest in these premises under the will of their father, his Honour declared that the said plaintiffs, as claiming under the will of their said father, ought not to be prejudiced by the release of the equity of redemption to Noah Barnard, dated 6th May 1752, made by defendants Ezra Ridgard and Martha his wife, as to what should be coming due to plaintiffs respectively under their said father's will, and decreed accordingly.

The cause was now re-heard before the present *Master* of the *Rolls*, and it was argued by *Pryce* and *Lloyd* for plaintiffs, that this sale being professedly and upon the face of the deed itself, made for the purpose of paying the second husband's debts, this was such a palpable misapplication of the assets as should take the case out of the general rule of a purchaser not being bound to see to the

application of the money, and should be sufficient to turn Barnard into a trustee for plaintiffs, in respect of their interest in the premises.

On the other hand, it was contended that in all cases of sales of chattel interests by executors, it is presumed that the executor sells for proper purposes, and therefore purchasers are always discharged from seeing to the application of the money. Besides which, in this case, there was a peculiar direction to the executors to sell: that in order to take the case out of the general rule one of three objections must be established, under value, notice, or fraud, neither of which was in this case substantiated. That here Barnard had advanced the consideration beforehand, instead of paying it at the time, which would make no difference. He had paid an executor the full value for part of the testator's assets, and was therefore discharged from all further inquiry. The cases cited were *Mead* v. *Lord Orrery*, 3 *Atk.* 235. *Crane* v. *Drake*, 2 *Vern.* 616. *Ewer* v. *Corbet*, 2 *Wms.* 148. *Burting* v. *Stonard*, 2 *Wms.* 150. *Nugent* v. *Gifford*, 1 *Atk.* 463. *Ithell* v. *Beane*, 1 *Vez.* 215. 2 *Vez.* 269.

Master of the Rolls.—I do not know the grounds upon which the former decree was made, but with all the deference due to that opinion, I shall abide by my own.

If I were inclined to confine myself to the single point upon which I shall finally decide this cause, I should omit taking notice of many of the points which have been argued; but as these points are of great importance and have been much agitated, and as I have formed an opinion upon them, I shall state what that opinion is. Nothing can be clearer than that an executor may go to market with his testator's assets, and that in general a purchaser will not be bound to see to the application of the money; but common honesty requires that if there is either express or implied fraud, the parties shall not avail themselves of it. I think the doctrine upon this subject is well laid down in a case which has not been cited at the bar, *Elliot* v. *Merriman*, in *Barnardiston's Rep.* There seems to me to

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be a great deal of good sense in the opinion delivered in that case, and it expresses very much my thoughts upon the subject. Many cases have been very properly cited for the sake of the general law; but they all seem distinguishable from the present case, except that of *Mead* v. *Lord Orrery* in 3 *Atk.* which I have great difficulty in distinguishing from this. It certainly becomes me to think much before I differ from Lord *Hardwicke*, but I cannot subscribe to his opinion in that case; and if it had come before me I should have decided it in direct opposition to that authority. Then taking the general rule to be as laid down in *Elliot* v. *Merriman*, let us see how it applies to the present case. As far as respects the mortgage to Mr. Mascall (in which there is a general recital only that Ridgard and his wife had occasion for 100*l.*) I have had some hesitation; but upon the whole I do not think that transaction impeachable; for I am of opinion that a purchaser from an executor need not have any recital of the purpose for which the money is raised. He is allowed to trust the person whom the testator has trusted. If on the other hand it appears to have been borrowed for improper purposes, to be sure the transaction cannot stand. Here the husband and wife join in the mortgage. The purpose for which the money is wanted is undefined. The money came to the hands of the executrix which it was her duty to apply, and, for any thing Mrs. Mascall could know, it was properly applied. Therefore as far as any body stands in privity of estate with Mrs. Mascall, the transaction is valid. But then comes the deed of 1752, which releases the equity of redemption to Barnard, which recites that Ezra Ridgard was then jointly indebted to Barnard in 200*l.* by bond, and 17*l.* for interest, and 127*l.* by simple contract, which several debts, together with 6*l.* in hand paid, amounting to 350*l.* is the consideration of the sale. This was a few months after the marriage of Ridgard to the executrix. This satisfies me that this money was not raised for fair legal purposes. The fund in the hands of the widow was applicable to the payment of the debts, &c. and after that to certain defined

purposes declared by the will. Barnard had full notice of the will; he knew that after the debts were paid this fund ought to be so applied, and he therefore connived at its being misapplied. If then the case turned upon this, I should be bound to set aside the transaction, or rather to turn the defendants into trustees for plaintiffs.

But there is another point upon which I must decide this cause, which is the length of time which has elapsed between the plaintiffs' right occurring, and their prosecuting that right. The testator died in 1748; the youngest child came of age in 1764, and though I admit the statute of limitations does not affect trusts, yet this court from a principle of convenience has borrowed an analogy from that statute. The common case is that of mortgagor and mortgagee; when mortgagee has been in possession for twenty years, without any particular impediment to the mortgagor, or if such impediment has been removed for ten years, it shall be a bar to the redemption. So in this case, I think the length of time ought to bar, and if the authority did not say so, I would make the precedent, for this very case shews the good policy of the rule. Here the many persons, through whose hands this property has passed, have relied upon the undisturbed possession, and have laid out considerable sums of money in the improvement of it upon that idea. It would be too much at this length of time to give the plaintiffs the relief required when the accounts cannot be taken. If these plaintiffs had made their claims when they all came of age, it would have been very different; but upon the whole, weighing the convenience with the inconvenience, I think it right to say that the length of time is a bar in this case.

Therefore as to all the defendants but Ridgard and his wife, this bill must be dismissed without costs, and the former decree must be varied accordingly.

In Linc. Inn Hall, Dec. 15, 1784. *Lord Chancellor.*

WILKINS *versus* MURE.

RE-HEARING.

Where the master of a *ship on behalf of the owner* lets the ship on charter party to A. and the owner becomes bankrupt, and his assignees give notice to A. not to pay any further sums of money on account thereof to the master, this notice will affect A. as to all sums paid afterwards by him to the master beyond what the master had actually paid or stood engaged for on account of the ship at the time of the notice; but will not defeat payments made to that extent.

Robert Brooke, being sole owner of the ship Africa, whereof the defendant William Carmichael was master, by indenture of charter party, dated 28th June 1776, and made between the defendant, "on behalf of the owners of the ship Africa, whereof he said Carmichael was master," of the one part, and the defendants Mure and Atkinson of the other part; the said William Carmichael did, on the part of the said owners, let the said ship to the defendants Mure and Atkinson to be employed in his Majesty's service in manner therein mentioned, as long as should be required. And Mure and Atkinson covenanted that Carmichael should be allowed 97*l.* 10*s.* per month for the said ship, while she remained in such employ. On the 9th January 1777, and while the ship was at New York on government service, a commission of bankruptcy issued against Brooke, and plaintiffs were chosen his assignees. And thereupon plaintiffs sent a written notice to Mure and Atkinson not to pay any sums of money due for freight to Carmichael, but to pay it to them, as assignees of Brooke. *After* this notice Mure and Atkinson paid to Carmichael a sum of 823*l.* 12*s.* 8*d.* the balance due on account of freight. The present bill was filed, insisting that Mure and Atkinson were bound by the notice to pay no part of the freight to Carmichael, and praying an account of the freight due from Mure and Atkinson by virtue of the charter-party, and that what should appear due on that account should be paid to the plaintiffs.

Defendants by their answers insisted that Carmichael being the contracting party, he was the proper person to whom Mure and Atkinson ought to pay the money due for the freight, more especially as Carmichael had either paid, or made himself liable to pay, the several tradesmen's bills for the outfit, and the subsequent expenses of the ship, and the seamen's wages, &c. and had since applied the money to such purposes.

Mitford for plaintiffs.—It is a principle in this *court*

that where one person has the legal right to receive a sum of money, but another person has the equitable right, *after notice* to the party who is to pay the money of such equitable right, payment to the legal hand shall not be good. It is so in the case of an assignee of a bond. In that case payment to the original obligee after notice of the assignment is bad. *Baldwin* v. *Billingsley*, 2 *Vern.* 540. 1 *Ch. Ca.* 232. So where a factor creates a contract between buyer and seller, although payment to the factor, without notice, would be good; yet after notice from the seller not to pay it to the factor, such payment would be bad. So in this case Carmichael was the legal hand to receive it, but the plaintiff had the equitable right. This payment being therefore after notice is bad, unless Mure and Atkinson can protect themselves under any right Carmichael had to apply the money in discharge of any demands which were liens on this fund. This then brings it to the question between Carmichael and the assignees, whether Carmichael has any right to retain it on account of an engagement he had entered into for the payment of money on the ship's account; but whether it shall turn out that Carmichael has any such lien or not, at all events as this money was in the hands of third persons at the time of the bankruptcy, the assignees will be entitled, subject to *such* lien, which can extend only to money he had absolutely engaged to pay at the time of notice. When this cause was heard before the Lords Commissioners in 1783, the court directed the bill to be retained for a year, with liberty for plaintiff to bring an action at law against Mure and Atkinson to recover the money, considering it as a legal right merely. The defendants pleaded the statute of limitations which had run against plaintiff's demand at the time of the action brought, although it had not at the time of the bill filed. On motion in this court that the defendants might withdraw that plea, and plead only the general issue, your Lordship thought that could not be done without re-hearing the cause; but by the present petition of re-hearing, the cause is completely open either for relief on the merits generally, or by

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removing the impediment of the statute of limitations, and on part of plaintiffs, I am to insist, for the reasons above-mentioned, that the right is not at law, but that the notice has given them an equitable claim, and therefore the former decree is wrong *in toto*.

Madocks for defendants Mure and Atkinson.—There is a clear distinction at law between the two different forms of charter party. 1st. Where the master contracts "for and on the behalf of the owners." 2d. Where the owners contract for letting the ship "of which A. B. is master." In the first rule the master is the only person entitled to receive the money; in the other case the owners are entitled. This distinction is taken in *Molloy*, and indeed it is founded on clear reason; for in one case the master being liable to engagements, as well as the owners, ought to receive the money on freight, to answer such engagements. In the other case it is the master's own fault if he enters into any. The fact is, that the assignees want the several tradesmen who have demands in respect of this ship to come in under the commission; but then Carmichael remains personally liable for the deficiency. Surely plaintiffs have then no equity against Carmichael. It will be very hard to take from him, in this situation, what by law, and by the term of the contract, he is entitled to recover.

The *Lord Chancellor*.—I agree that Carmichael had the right at law to bring his action for the money due on freight, and that some equity must be raised to take away his right of retaining that money. But suppose Carmichael had made no engagements at all, surely the justice of the case would have been that he should not retain this money after the notice from the plaintiffs. I think that so far as Carmichael had made engagements for the ship previous to the notice, the money was properly applied by Mure and Atkinson; but all beyond that was improperly paid.

The decree must therefore be reversed, and an inquiry must be directed to the Master of what money Carmichael had paid, or stood engaged for, or was liable to pay, on account of the

ship at the time of the notice, and also what sums of money Carmichael had engaged, or was liable to pay on account of the ship, between the time of the bankruptcy of Brooke, and the time of the notice: and let the further directions and the consideration of costs be reserved.

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WORRALL *versus* MARLAR.

BUSHNAN *versus* PELL.

In Linc. Inn-Hall, Dec. 16, 1784. Lord Chancellor.

RE-HEARING.

In the first cause Sarah Worrall the wife of John Worrall, by Thomas Champion Bateman, her next friend, was Plaintiff.

And

John Marlar and John Market, executors of James Pell, deceased, the said John Worrall and Joseph Bushnan, assignees of the Effects of John Worrall, were Defendants.

In the cross cause Bushnan was plaintiff; and James Pell, the younger son and heir at law of old James Pell, John Marlar, John Market, John Worrall, and Sarah his wife, were defendants.

James Pell the testator who was the father of Sarah Worrall by bond, dated 10th of November 1737, and made previous to his marriage with Elizabeth Market the mother of Sarah Worrall, became bound to John Market in the penal sum of 20,000*l.* conditioned (amongst other things) for payment of one full third part of such real and personal estate as he should die seized or possessed of, unto the said John Market in trust for such of the children of the marriage as should be living at his death, to be equally divided between them. The testator had two children who survived him, Sarah Worrall and James Pell the younger; Sarah married the defendant John Worrall in her father's lifetime without his consent, and without any fortune or

A. on his marriage executed a bond, conditioned for payment of one third part of the real and personal estate, he should die seized and possessed of, equally amongst his children, who should be then living; he left two children B. a son and C. a daughter. C. married W. in her father's lifetime without settlement; W. took the benefit of an insolvent debtor's act. A. died and by will gave to C. 8000*l.* in lieu of the interest she took under the bond: the

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legacy appear- to be the most beneficial provision. On a bill filed by C. for her legacy, and a cross bill by the assignee of W. to have the benefit of it, it was decreed that the assignee could have no interest beyond the amount of one-sixth part of the real and personal estate, and that he and W. should lay proposals before the Master for a settlement on C. and her children. The assignee proposed to settle one moiety on the wife and children, and to divide the other moiety amongst the creditors of W.: this proposal was approved by the Master, and was carried into execution by the Court.

settlement. Sometime after this marriage, John Worrall, in 1778 took the benefit of an insolvent debtors act, and an assignment of his estate was duly executed to Bushnan, one of his principal creditors. James Pell the father died about December 1781, having first made his will dated 22d November 1775, whereby after taking notice of the said bond he gave to plaintiff Sarah Worrall 8000*l.* in lieu of the share of his estate, to which she was entitled, by virtue of the said bond, if she chose to accept it; and if not he gave her nothing; and he gave all the residue of his estate to the defendant James Pell, the younger, and appointed the defendants Marlar and Market his executors.

The plaintiff Sarah Worrall filed her bill, stating these several matters, offering to accept the legacy of 8000*l.* and praying that she might be at liberty to make her election thereof, under the direction of the Court; and that the said money might be laid out, invested, and settled for her separate use, and some provision made thereout for her children.

The plaintiff Bushnan filed the cross bill, claiming as assignee to be entitled to make such election as the said John Worrall would be entitled to make under the said will or bond, in case he had not become insolvent; and praying an account of the real and personal estate of the testator James Pell, and that he might be at liberty to make his election under the decree of the court.

These causes came on to be heard together, before the late Master of the Rolls, who referred it to the Master to take an account of the real and personal estate of the testator Pell, and reserved all further directions until after the Master's report. By the Master's report it appeared, that the real and personal estate amounted to 39,844*l.* 6*s.* 2½*d.* one sixth thereof was consequently much less than the legacy of 8000*l.* On 13 December 1783, it was ordered upon motion, that the sum of 8000*l.* should be paid into the Bank and laid out, which was accordingly done in the purchase of 14,285*l.* 14*s.* 6*d.* three per cent. annuities.

On hearing these causes on further directions, before the

Lord Chancellor, his lordship directed that John Worrall should make a proposal to the Master for a settlement on his wife, and the issue of the marriage. On 20 June 1784, the Master reported that John Worrall had proposed, that the whole sum of 14,285*l.* 14*s.* 6*d.* three per cent. annuities, should remain in the name of the accountant general, in trust for the wife to receive the dividends for her life, not subject to the debts or control of the husband; and after her decease, for him, the husband, to receive one half of the dividends for his life; the other half to be applied to the maintenance and education of the children; and after the death of the survivor, the whole to be divided amongst the children, and if no children, the whole to go to the husband; which proposal the Master approved of. To this report, Bushnan excepted, for that the Master had not received any proposal from him, on the part of the creditors; nor had given them any interest in the fund: and on the argument of the exceptions, it was insisted on the part of the creditors that the interest which Worrall had in this fund, in right of his wife, passed by the insolvent act to Bushnan the assignee, and that the Master ought therefore to have received proposals from Bushnan as well as Worrall. But the *Lord Chancellor* was of opinion that as it was referred to the Master, to receive proposals from Worrall only, he was not at liberty to receive any from Bushnan; and that it would be necessary to re-hear the causes, in order to alter the order of reference in that respect; and that the exceptions should come on at the same time.

The two causes accordingly now came on upon petitions of re-hearing.

Attorney General and *Stratford*, for Bushnan.

There are two questions in this cause. First, whether this interest, which Sarah Worrall took under the bond, or by the will, in the real and personal estate of the father, passed by the act of Parliament to Bushnan. Secondly, whether, if it did, the assignee could take it, without making a provision for the wife, and the issue of the marriage. As to the first, the words of the act are very comprehensive; it directs

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that "all the estate, right, title, interest, and trust," in and to the real and personal estate of the prisoner shall vest in the clerk of the peace, &c. for the purposes therein mentioned; vide 18 *G. 3. c. 52.* It must be argued by analogy to the cases of bankrupts, in which cases it has been repeatedly determined, that all contingent interests pass to the assignees, *Jacobson* v. *Williams*, 1 *Wms.* 382. *Miles* v. *Williams*, 1 *Wms.* 249. *Heydon* v. *Williamson*, 3 *Wms.* 132. *Jewson* v. *Moulson*, 2 *Atks.* 417. *Bates* v. *Danby*, 2 *Atks.* 207. It must be admitted, that the word "possibility" is inserted in the bankrupt laws; which is not to be found in the insolvent act; but the words which are used, are sufficient to pass every interest whatever. As to the second question, it must be allowed, that as against the husband, the wife would have an equity, to entitle her to have some provision made for her and her children, out of her own money; but there is no case in the books which has decided that an assignee of the husband, by *contract* for a *valuable consideration*, shall not retain the interest assigned, without making a provision for the wife: and the contrary seems to have been determined, in the case of *Tudor* v. *Samyne*, 1 *Vern.* 270.

Madocks, for Sarah Worrall.

The testator died three years after Worrall took the benefit of the act of insolvency. Therefore as to any interest which passed by that will, it clearly could not vest in the assignee Bushnan, as it did not then exist in any shape. As the legacy of 8000*l.* exceeded one sixth part of the testator's estate by about 1500*l.* it is perfectly clear, that as to the surplus, over and above the interest given by the bond, there can be no pretence to say that such surplus could vest in Bushnan. But as to the interest taken by the bond, it is not such an interest as passes by this act to the clerk of the peace or the assignee. The act only means to vest in the clerk of the peace, what is then *possessible* and divisible. There are no words which give possibilities. This is a mere possibility. Sarah Worrall might not have been alive at her father's death. This is not a vested interest, defeazable by a subsequent event, which would have passed

under the act; but the very purposes for which the property of the prisoner is vested in the clerk of the peace, clearly shews that it must be something which is capable of being possessed, and divided and sold at the time.

The Lord Chancellor said, that with respect to the rehearing, it was altogether a matter of form; for the merits of the case would come properly on upon exceptions; for if the assignee stands in the husband's place, in all probability the Master will continue of the same opinion, as to what is a proper settlement upon the wife. He took it to be clearly settled that a contingent interest, is an interest that passes in these cases. The cases in *Vent.* 310. and *King* v. *Withers* in *Forrester*, seem to have established this. Those were both cases of money to which the right was then actually given. But this is carried a step further, for here the right was not to be given, until the death of the father, which happened three years afterwards. There is no doubt but that a direct interest, though in contingency, is assignable; as a lottery ticket; but here nothing existed at the time of the insolvency. Then does an interest so circumstanced pass by the act? The difference between this case does not arise on the word "possibility," for that is a very vague word, which though it had in the days of Lord Coke a precise meaning, seems to have lost it now; but the main difference is, that in bankruptcy all the future effects which accrue to the bankrupt, until his certificate, vest in the assignees; but in the case of insolvent debtors, nothing passes but what is in them at the time: and this case must be therefore considered as if it were the case of a certificated bankrupt. Then the objection is, that this interest could not pass as a thing in action, because the action did not accrue till afterwards. But this distinction seems too fine, and it must be considered as a *present* interest of some sort, of course of less value in proportion as the contingencies are more remote. The former decree must be varied, by directing that it shall be referred to the Master, to receive proposals for a settlement, both from the husband and the assignee.

The next morning the *Lord Chancellor* said, he had con-

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sidered this case a good deal, and that he thought the direction must be to distinguish what part of the 14,285*l.* 14*s.* 6*d.* three per cents. was bought with the amount of the one-sixth part of the testator's estate: for he was clearly of opinion, that the creditors could have no claim beyond that; and that the assignee's proposals must be confined to that amount. I have looked (said he) into the several cases upon this subject, and I do not find it is any where decided, that if the husband makes an *actual* assignment by *contract* for a *valuable* consideration, the assignee shall be bound to make any provision for the wife out of the property assigned; nor do I find any case decided the other way; but this court has much greater consideration for an assignment actually made by contract, than for an assignment by mere operation of law. For as to that, my opinion is, that when the equitable interest of the wife is tranferred to the creditor of the husband, by mere operation of law, without any express consent of the wife, as in this case, he stands exactly in the place of the husband, and is subject precisely to the same equity in respect of the wife. And it seems to me that in the case of *Jewson* v. *Moulson*, Lord *Hardwicke* went on the ground of the transfer being by immediate contract made upon the occasion, in contradistinction to a transfer by mere operation of law.

In pursuance of this order, Bushnan and Worrall laid proposals before the Master, and it appearing that the 8000*l.* had been laid out in the purchase of 14,285*l.* 14*s.* 6*d.* three per cent. Bank annuities, of which sum 11,858*l.* 9*s.* was purchased with the amount of one sixth part of the real and personal estate of the testator; Bushnan proposed that one moiety of the said sum of 11,858*l.* 9*s.* should be settled on Sarah Worrall and her children, in manner therein mentioned; and that the other moiety should be paid to Bushnan, to be distributed amongst the creditors of Worrall. And Worrall proposed that a moiety of the 11,858*l.* 9*s.* together with the residue of the said sum of 14,285*l.* 14*s.* 6*d.* should be settled on Sarah Worrall for her life, to her separate use, and after her death to be

paid to her surviving children equally, and if no children should survive her, then to be paid to Worrall. And the Master having approved these proposals, the causes were again set down for further directions before the *Master of the Rolls*: and his Honor directed the Bank annuities to be transferred accordingly.

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MILES *versus* NEAVE.

In Linc. Inn Hall, Dec. 21, 1784. Lord Chancellor.

PETITION.

A trustee by his answer declined to act, and on the hearing it was referred to the Master to appoint new trustees, the original trustee afterwards agreed to act, and on application to the court that the trustee might be at liberty to amend his answer in this respect, so as to enable the court on a re-hearing to vary that part of the decree, the court refused to do this; but thought the Master was at liberty on statement of these circumstances to decline the appointment of new trustees.

A defendant trustee having by his answer (put in *without* oath) declined acting in the trusts of the will, a decree was made, directing (amongst other things) that the Master should appoint new trustees. It was afterwards agreed amongst the parties that the original trustee should act in the trusts; but it being apprehended that under the present decree the Master could not appoint him, and that it would be in vain to re-hear the cause, while the answer remained in its present state, inasmuch as no error would appear in the decree, a petition was now preferred, praying that the original trustee might amend his answer, by submitting to act in the trusts, in order that the cause might be reheard, and directions given accordingly. And the case of the *Countess of Gainsborough* v. *Gifford*, 2 *Wms.* 424, was cited to shew that in some cases the court would allow an answer to be amended, although the cause had proceeded to hearing.

But the *Lord Chancellor* said he should be very careful how he made a precedent of altering an answer after a decree; and in the present case he did not conceive it necessary, for he thought if the parties went before the Master and stated the agreement they had come to, the Master might report this circumstance, and decline to appoint new trustees.

POOLE *versus* SHERGOLD.

In Linc. Inn Hall.
Jan. 19, 1785.
Lord Chancellor.

EXCEPTIONS.

It is no objection to the title to an estate that an extent had issued from the crown against the owner which remained in the hands of the sheriff unexecuted, it appearing that the Lords of the Treasury had, in fact, compromised the debt, though a writ of *Amoveas Manus* had not actually issued.

On reference to a Master to see whether a good title can be made, the master proceeds on the abstract only, unless the purchaser requires the production of the deeds themselves; and if he omits to make such requisition he cannot except to the report on the ground of the deeds not

Upon a bill filed to compel a specific performance of an agreement for the purchase of an estate, it was referred to the Master to inquire whether the plaintiff could make good a title to the defendants, and the Master reported that a good title could be made. To this report defendant took several exceptions, impeaching plaintiff's title; and the first exception was on the ground of the estate in question being liable to an extent from the crown, by reason of which no title could be made without obtaining a writ of *amoveas manus* to discharge it. The circumstances of the case were as follows:—Sir William Young, who had conveyed the estate in question to the plaintiff Sir Frederick Poole and Mr. Rowe, in trust, to sell for some particular purposes, being indebted to the crown upon the balance of an account in a very large sum of money, to the amount of upwards of 150,000*l.* an extent issued on the part of the crown; but a proposal having been made by Sir William Young to secure to the crown the payment of this balance, by vesting his real estates in trustees, in trust, to satisfy this debt in the first instance, the extent remained in the sheriff's hands, and was never executed. Afterwards the Lords of the Treasury, with the advice of the *Attorney* and *Solicitor-General*, agreed to the proposal of Sir William Young, and he accordingly conveyed several real estates to the plaintiffs Sir Frederick Poole and Mr. Rowe, on the specific trust. It was now insisted on the part of the defendant, that as this extent had never been discharged by any proceeding upon record, it still remained a lien on the estate in question. To this it was answered, and agreed to by the *Lord Chancellor*, that the Lords of the Treasury having agreed to accept of the security proposed by *Sir William Young*, this operated as a waver of the

extent on the part of the Crown, which must therefore be considered as absolutely gone, and it was consequently impossible to discharge by any means what did not exist; that if the Crown thought proper to proceed at all, it must be by issuing a fresh extent, which under these circumstances ought to be immediately discharged upon application to the court of Exchequer; and this being the manifest justice of the case, this court will never consider the possibility of an unjust charge being made upon the estate, as an objection to the title, since the best title in the world cannot prevent unjust claims: and, on the whole, therefore, that there was no objection to the title on this ground, and consequently the exception must be over-ruled.

having been produced before the Master.

Another exception taken was, as to the title of some copyhold lands, for that no surrenders had been produced before the master. To this it was answered, that an abstract of the several surrenders had been produced, and not objected to by the defendant; that it was the constant practice in the Master's office to produce the abstract only (which in general is previously compared by the vendee's attorney with the title deeds), and that if the vendee does not insist upon the production of the title deeds, the Master makes his determination on the abstract only, which had been done in the present case. And to this the *Lord Chancellor* agreed, and said that as the vendee may call for the title deeds before the Master, if he thinks proper, he should take it for granted, whenever the vendee omits so doing, that he was satisfied the abstract was correct. And therefore though this exception was true in letter, it was false in spirit; for in reality the production of the abstract unimpeached, was the production of the surrender, and therefore over-ruled the exception.

In Linc. Inn Hall, Jan. 21, 1785. Lord Chancellor.

LEWIS *versus* LEWIS.

PETITION.

Testator authorised his executors at any time before T. L. should attain the age of 26 years, to raise by sale of a sufficient part of certain bank annuities, any sum of money not exceeding 600*l.* and pay and apply the same towards the preferment or advancement in life, or other the occasions of T. L. as the said executors should think proper; and at the age of 26 he gave the said 600*l.* to T. L. absolutely. The executors declining to act, the court will not give this 600*l.* to T. L. before 26, without referring it to the Master to inquire whether T. L.'s situation requires the 600*l.* or any part thereof to be advanced.

Thomas Lewis, by will, dated 22d June 1776, gave the sum of 3333*l.* 6*s.* 8*d.* 3 per cent. bank annuities to Charles Owen and Thomas Pickering, upon trust to pay and apply the dividends and interest thereof towards the maintenance and education of plaintiff (the petitioner) in manner therein mentioned, until he should attain the age of 21, and after he should attain that age, then upon trust to pay the whole interest of the said 3333*l.* 6*s.* 8*d.* 3 per cent. annuities to the petitioner, or authorize him to receive the same for his own use during his life; and the said testator authorized and empowered the said Charles Owen and Thomas Pickering at any time before the petitioner should attain 26 years, to raise by sale of a sufficient part of the said annuities, any sum or sums of money, not exceeding 600*l.*, and pay and apply the same towards, or in order to the preferment, or advancement in life, or other the occasions of the petitioner, as they the said Charles Owen and Thomas Pickering, or the survivor of them should think proper, and at 26 he gave the 600*l.* to petitioner absolutely; and he appointed the said Charles Owen and Thomas Pickering executors.

Charles Owen and Thomas Pickering declined proving the will or acting in the trusts thereof, and letters of administration were granted to the defendant. Owen afterwards died, leaving Pickering the survivor. By a decree made in the cause on the 1st of December 1779, the 3333*l.* 6*s.* 8*d.* per cent. were ordered to be transferred into the name of the Accountant-General, to the credit of the cause to plaintiff's use on the trusts of the will. The present petition prayed that the Accountant-General might be directed to sell so much of the 3 per cent. annuities as would produce the sum of 600*l.* and that the same might be paid to the petitioner, and the interest of the

Compare 2 Madd. 22. Rom. 234.

remainder be paid to him for life, the petitioner having attained the age of 21 years. *Lewis v. Lewis.*

Madocks and *Hollist* for petitioner insisted, that by the words of the will, he was now entitled to have the 600*l.* raised and paid to him; and they cited the case of *Cope* v. *Wilmot*, 2d and 3d March 1772, at the Rolls. *Deache* v. *Oldknow*, before *Sir Joseph Jekyll*, 1720, and *Barlow* v. *Grant*, 1 *Vern.* 255.

Lord Chancellor.—This is not the case of a gift by the testator, but a power to others to give, and that seems confined to answer some particular purposes. The proper question to be made in this case is, whether the present situation and circumstances of the petitioner are such as the testator intended this legacy for. I shall therefore refer it to the Master to inquire whether the present situation of petitioner requires any, and what part of this money to be advanced before his age of 26, and to report the grounds of his determination.

FOY *versus* FOY.

At the Rolls, Feb. 1, 1788. *Sir Lloyd Kenyon.*

Sydney Hollis Foy Esquire made his will, dated 26th May 1783, and afterwards went abroad, between which time and the time of his death, which was in the month of December following, he wrote five several papers, which were all proved in the Ecclesiastial Court as testamentary papers, together with the will. By the will, and by each of these codicils, he gave several legacies. The will charged the real estate with payment of debts and legacies, and the will and first codicil were executed so as to pass real estates; but the four last codicils were not properly attested. In several instances he had given legacies twice to the same persons, but by different instruments; particularly by the fourth codicil, which was a letter, dated 5th December 1783, to Edward Bridger, he said, "As I am much indisposed in health, and wish to make an acknowledgment

Where legacies are given by different instruments (whether will and codicil, or two codicils) to the same persons, they will in general be accumulative. A legacy "towards the erecting and endowment of an hospital for the county of D" is void, if it were necessary to pur-

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chase land for the purpose; but it might go in aid of the endowment of any hospital already existing.

The court will not marshal assets in favour of a bequest within the Stat. of *Mortmain.*

to Mr. Walne, I request, as soon as can be done after my decease, you will pay him 50*l.* sterling out of the money you have of mine in your hands." And by the 5th codicil dated 10th December 1783, he gave Mr. Walne generally a legacy of 100*l.* So by the will he gave a Mr. Knowles 100*l.* and Mr. Sympson 100*l.*; and by one of the codicils he gave Mr. Knowles 50*l.* and Mr. Sympson 100*l.* The several legatees claiming double legacies, his Honour said, that although he should have had great doubt (in case it had been competent to him to have decided the question) whether the last paper, which was proved as a codicil, was not, in fact, a new will, and therefore revoked all the others; yet as the Ecclesiastical Court had granted probate of them all, he was bound to consider them all as subsisting in full force; and being so, he thought it was fully decided by the case of *Hooley* v. *Hatton*, before Lord *Bathurst*, assisted by Lord Chief Baron *Smythe*, and Mr. Justice *Aston*, that a legatee should take a legacy by the will, and another by the codicil *accumulativè*; that he considered that case as a very great authority, having been decided upon great consideration, and with the assistance of very learned judges, one of whom particularly (Mr. Justice *Aston*) had upon the occasion examined very deeply the several authorities of the civil law upon the subject. The only case which seemed to clash with *Hooley* v. *Hatton*, was that of *Duke of St. Albans* v. *Beauclerk*, 2 *Atks.* 636; there, indeed, Lord *Hardwicke* decided in great measure upon the similarity of the several legacies in the two instruments which he shewed by putting them into corresponding columns; and thence he collected that the testatrix must mean one and the same thing, and a re-transcribing of the will. However, upon the whole, his Honour said he wished to be understood to be guided by the authority of *Hooley* v. *Hatton*, and he should therefore declare these several legatees to be entitled to both legacies.

With regard to the point whether the legatees under the will and the first codicil (which was proved according to the statute of frauds) should have resort to the real estate,

in order to let in the legatees under the other codicils upon the personal estate (in case the personal assets should prove deficient) his Honour said that was a point of great nicety, and he should give no opinion upon that until the Master had taken an account of the personal estate. *Foy* v. *Foy.*

Another question arose upon a legacy given by the testator towards "the *erecting and endowing* of an hospital for the county of Dorset," whether this was a devise within 9 *Geo.* II. and the case of *Attorney-General* v. *Bowles*, 2 *Ves.* 547, was mentioned. And his Honour declared that if it were necessary to buy land, to build the hospital upon it, it must clearly be within the statute; but it might go in aid of the endowment of any hospital already existing. He therefore referred it to the Master to inquire whether there was any hospital existing in Dorsetshire.

Some mention having been made of marshalling assets so as to let in the charities upon the personal estate which were void devises as to the real estate, his Honour said that doctrine was now wholly exploded as an evasion of the statute, particularly by the case of the *Attorney-General* v. *Tindall*, which was successively decided so by Lord *Northington*, Lords Commissioners, and Lord *Camden*. 1 *Ves.* 108.

SOWDEN *versus* SOWDEN.

At the Rolls, Feb. 3, 1785. *Sir Lloyd Kenyon.*

For Case and Argument, *vide* 1 Brown. Cha. Rep. 582.

Master of the Rolls.—I feel myself in the same situation in which Lord *Hardwicke* expressed himself to be, not inclined to carry these cases further than they have been carried; but at the same time I must not make nice and finical distinctions where the cases are in substance the same with those in which the points have been decided. As to all hardship in this case, I lay all consideration of it totally aside. I must decide this by the cases before decided, and not depart from the established rules of property. Now in this case, beyond all doubt, it was incum-

On marriage the husband covenants to pay to trustees the sum of 2000*l.* at least, to be by them laid out in land in the county of D. and settled to the uses of the marriage; the husband ne-

Wilcox v. Geesham 5 D. M. G. 772.

Sowden v. *Sowden.*

bent on the husband to lay out the money on real estate; but the distinction which has been taken is, that the husband covenanted to pay the money to trustees to be laid out, and therefore his laying out money *himself* in the purchase of the estate, could not be meant as complying with that covenant, and I think the distinction taken by *Mr. Hardinge* a very important one (and would deserve great consideration if it were *res integra*) between this case where the money is to be paid to trustees, and the others where the party covenants to make the purchase himself. But the main case on which I chuse to rely is that of *Lechmere* v. *Lechmere.* In *Forrester's Report* of that case a very material circumstance is omitted, which is mentioned in *P. Wms.* namely, that the covenant was to purchase, with the consent of the Earl of Carlisle and Lord Morpeth, and that the purchases made by Lord Lechmere were without that consent. However, this case having decided, that if a man covenant to purchase land *modo et formâ*, and if he do purchase at all, whether *modo et formâ*, or otherwise, it shall be the same thing, this gets rid of great part of the argument; and then I cannot distinguish the present case from *Lechmere* v. *Lechmere.* The principle is, that "where a man covenants to do an act, and he does an act which may be converted to a completion of this covenant, it shall be supposed that he meant to complete it." Here the land was in the particular county specified. The case of *Lechmere* v. *Lechmere* seems to be exactly in point; and upon that case (the principles of which I coincide in) I shall declare this estate to be subject to the trusts of the settlement.

ver pays the money to the trustees, but soon after the marriage purchases land in the county of D. and takes the conveyance to himself in fee, and then dies intestate, without making any settlement. These lands will be considered as purchased by the husband in pursuance of his covenant, and be liable to the trust of the settlement.

At the Rolls, Sir Lloyd Kenyon. Feb. 15, 1785.

LAWES *versus* BENNETT.

A. makes a lease to B. for 7 years, and on the lease is indorsed an agreement that if B. shall within a limited time be minded to purchase the inheritance of the premises for 3000*l*. A. would convey them to him for that sum. B. assigns to C. the lease and the benefit of this agreement. A. dies, and by will gives all his real estate (generally) to D. and all his personal estate to E. and D. equally. Within the limited time, but after the death of A., C. claims the benefit of the agreement from D. who accordingly conveys the premises to C. for 3000*l*. This sum of 3000*l*. when paid, is part of the personal estate of A, and E. is entitled to one moiety of it as such.

Thomas Witterwronge, seized in fee of a farm called Bently, by indenture, dated 2d October, 1758, demised the said farm to John St. Leger Douglas, Esquire, his executors, administrators, and assigns, for seven years, under the yearly rent of 106*l*. 14*s*. 6*d*. and upon the back of the said indenture was indorsed a memorandum or agreement signed by Witterwronge and Douglas, bearing even date with the said indenture, whereby it was agreed by and between the said Witterwronge and Douglas, that in case Douglas should at any time after the 29th of September 1761, and before the 29th of September 1765, be desirous of absolutely purchasing the fee simple and inheritance of the said premises, mentioned in the said indenture, for the sum of 3000*l*. to be paid by him to the said Witterwronge at the execution of the conveyance thereof, and of such his mind and intention should give notice in writing to the said Witterwronge before the 29th September 1765, then Witterwronge agreed to sell to Douglas the fee simple and inheritance of the said premises for the said sum of 3000*l*. and to execute proper conveyances thereof.

Thomas Witterwronge, by his will dated 1st September 1761, devised all his real estates of which he was seized or entitled to, unto his cousin John Bennett, and he thereby gave and bequeathed his personal estate to the said John Bennett, and to the plaintiff Mary, sister of the said John Bennett (after payment of his debts and legacies) to be divided equally share and share alike, and appointed John Bennett and plaintiff Mary joint executors.

Testator died in June 1763, and on 11th February 1764, John Bennett settled an account with plaintiff Mary, of all the testator's personal estate, and paid her 324*l*. 6*s*. 3*d*.

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as her moiety thereof, and the account was signed and allowed by both of them.

By deed poll, dated 2d March 1762, made between the said John St. Leger Douglas of the one part, and William Waller Esquire of the other part, after reciting the said lease of 1758, and the memorandum or agreement thereon indorsed, the said John St. Leger Douglas, for the consideration therein mentioned, assigned the said premises and all his interest therein, and all benefit and advantage which should or might arise from the said agreement to the said William Waller, his executors, administrators, or assigns, for all the residue of the term then to come therein.

On the 2d February 1765, William Waller called upon John Bennett to perform the contract entered into by the testator for sale of the premises for 3000*l.* which Bennett complied with, and accordingly by indentures of lease and release, dated 1st and 2d February 1765, in pursuance and performance of the said agreement, so indorsed upon the said indenture of 1758, and in consideration of 3000*l.* the said John Bennett did bargain, sell, &c. the said premises to the said William Waller, his heirs and assigns for ever.

In 1779 John Bennett died, leaving defendant his widow and executrix; and the present bill was filed by Thomas Lawes and Mary his wife (sister of the said John Bennett), stating, that they had not until lately discovered the sale of the estate to Waller, and claiming one moiety of the purchase money received by Bennett, as being part of the personal estate of the testator Witterwronge, and which he had devised equally to Bennett and plaintiff Mary. And this was the single question in the cause, whether the premises being part of the testator's real estate at the time of his death, but sold afterwards under the circumstances aforesaid, the purchase money should be considered as part of the real or personal estate of the testator.

Madocks and *Lloyd* for plaintiffs.—This sum of 3000*l.* is part of the personal estate of the testator, and one moiety

therefore passed by the will to plaintiff Mary. This proceeds upon the general principle acknowleded in this court, that where the owner of any property makes a contract for the sale of that property, or shews by any other means an intention of converting real property into personal, or *vice versa*, this court, as between his real and personal representatives, will carry such intention into execution. If the agreement had been that the testator should at the expiration of ten years, or any specified time, convey the premises for a certain sum, there could not have been a doubt but that it would have been personal estate, although the absolute conversion did not take place until afterwards. Here the only difference is, that the conversion was to take place or not, at the option of Mr. Douglas, but when Mr. Douglas or his assignees had made his choice, then the conversion became absolute. It is perhaps not a very common case for a person to leave his property in such a situation as that it shall become real or personal, by the determination of a third person; but there can be nothing illegal in it. The absolute owner of property may give a stranger any power he thinks fit over it. Witterwronge was bound by this agreement; therefore Bennett, his devisee, was bound by it. The application was made to Bennett on the ground of the contract, and he makes the conveyance in pursuance of it. Bennett being one of the executors has made the difficulty; for suppose any other person had been the executor, and Bennett had refused to convey the premises, and Waller had filed a bill to compel a specific execution of the contract, the executor of Witterwronge must have been brought before the court as a party to the suit, and must have received the money from Waller, and not Bennett; but in this case Bennett being one of the executors, he received the money in that capacity. As to the argument that the testator, because he meant to give Bennett the estate, meant to give him what was produced by the sale of it, it is not of any weight, as perhaps it might have been, if the testator had devised to him this single estate specifically; but this is a general

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sweeping clause of all the real estate. And the testator had time enough before his death to alter his will in favour of Bennett, if he had so inclined. As to the length of time which has elapsed, it can be no objection to the plaintiff's demand, for a considerable length of time elapsed before she knew that the money had been paid for the estate. Then with regard to interest, it appears in proof that Bennett laid out the money in the funds, and he must therefore pay interest for it at 4 per cent. from the 1st of February 1765, the day on which he received it, it being part of the personal estate remaining in the hands of one of the residuary legatees.

Scott and *Ainge* for defendant.—This is a case in species perfectly new. In order to establish the plaintiff's claim, it must be contended that the testator meant his estate should be either real or personal, and consequently go to this or that person, at the choice of Mr. Douglas. This is rather difficult to imagine. He intended the benefit of this estate should pass under the general devise to Bennett; and why is it to be supposed that he meant Bennett should be deprived of that benefit because Douglas chose to buy the estate? The cases certainly have established the principle, that where the owner of an estate has contracted for the absolute sale of it, that property shall be considered as the personalty of the owner; for that is a declared intention of his to convert the real property into personal, and it is obligatory on the other contracting party; and if either party die, his representative has an immediate right to enforce the contract; he knows what the property is, and applies it accordingly. But here is no declared intention of the testator, but it is left to Mr. Douglas's choice, and accordingly to this construction a simple contract creditor might wait twenty years to know whether there were any assets or not. So in another point of view, suppose Bennett and Douglas had come to an agreement that Douglas should release to Bennett his power of election for 100*l.* or any other sum, who could have prevented it?

Master of the Rolls.—Although this case may be new in species, yet the principles upon which it seems to me to depend are perfectly clear, and are so well established in this court, that if I am wrong it must be by misapplication of those principles. No stress can be laid upon the will of Witterwronge, for that is expressed in very general terms. He had two species of property, one of which gives to Bennett, the other to Bennett and his sister. Then which kind of property is the present? It is very clear that if a man seized of a real estate contract to sell it, and die before the contract is carried into execution, it is personal property of him. Then the only possible difficulty in this case is, that it is left to the election of Douglas whether it shall be real or personal. It seems to me to make no distinction at all. Suppose a man should bargain for the sale of timber, provided the buyer should give proper security for the payment of the money. This when cut down would be part of the personal estate, although it depends upon the buyer whether he gives security or not; (as to what has been said about Douglas's being able to release his power of election, I think a court of equity would relieve against that, if it appeared to be done collusively to oust the legatee of his personal estate;) when the party who has the power of making the election has elected, the whole is to be referred back to the original agreement, and the only difference is, that the real estate is converted into personal at a future period. The case of *Bowes* v. *Lord Shrewsbury*, (*a*) shews the nature of the property may be altered otherwise than by the act of the original owner, although that was altered by the act of the legislature and not of any third person: but it shews generally that there is no impossibility in the nature of the thing. As to the length of time, I think I can take no notice of it in this case, for here there is no pretence to presume the demand satisfied. On the contrary, it has been withholden for another reason. I must therefore declare this 3000*l.* to be part of the personal estate of the testator, and that the plaintiffs are entitled to one

(*a*) 5 Bro. Parl. Ca. 269.

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moiety thereof, and the Master must inquire whether the plaintiff Thomas has made any, and what settlement on the plaintiff Mary, &c. And as to interest, as it appears that Bennett laid out this money in the funds, and consequently has made interest of it; he must be answerable for interest, from 1st February, at 4 per cent.

No costs on either side.—*Reg. Lib. B. 1784. fol. 225.*

At the Rolls. Sir L. Kenyon. Feb. 16, 1785.

WILSON *versus* EARL OF DARLINGTON.

A. seized of a remainder in fee expectant on an estate tail in N. limited the same to himself for life, remainder to trustees for a term of 99 years, on trust amongst other things to raise and pay such sums of money, and to such persons as A. should by deed or will appoint: and he reserved to himself a general power of revocation of all the uses thereby limited. A. afterwards by deed appointed that when the said estate tail should be spent, and the term come

The question in this cause was, whether a sum of 2000*l.* granted by the late Earl of Bath to George Wilson, and passing by the will of the said George Wilson to plaintiffs, should be raised out of the real estates, mentioned in the bill, or should be paid out of the personal estate of Lord Bath.

By indentures of lease and release bearing date 8th and 9th of August 1743, made between the Earl and Countess of Bath, of the first part; Lord Viscount Pulteney, the son, and Henry Pulteney, brother of the said Earl, of the second part; Samuel Sandys and Sir John Rushout, of the third part; and Richard Mead and Robert Ord, of the fourth part; reciting that Henry, late Earl of Bradford, did by will, dated the 8th of May 1730, devise all his manors, lands, tenements, and hereditaments whatsoever, to John Hill, Hugh Briggs, and George Middleton, and their heirs, upon the trusts in the will mentioned; and reciting that the said Earl of Bradford did by a codicil, dated 16 May, direct that for want of issue of the body of John Harrison in the said will named (who afterwards took the name of Newport) the said trustees should stand seized of all the said Earl's estates, in trust for Ann Smyth and her heirs for ever: and reciting that the said Ann Smyth by her will, dated 19th of June 1742, devised all the said manors,

lands, &c. and the reversion and inheritance thereof, from and after the death of the said John Newport, and for want of issue of his body, unto the said Earl of Bath, his heirs and assigns for ever; and reciting that the said Ann Smyth soon afterwards died; it was witnessed that for the considerations therein mentioned, the said Earl did bargain, sell, &c. to the said Samuel Sandys, and Sir John Rushout, and their heirs, the reversion and remainder in fee of and in the said premises, upon the trust, therein mentioned, that is to say, to use of the said Earl for life, remainder to trustees to preserve, &c.; remainder to said Richard Mead and Robert Ord, and their executors, &c. for a term of 99 years, the trusts of which term were declared to be for the purpose of securing an annuity of 1000*l.* to the said Countess for her life, in augmentation of her jointure; and upon further trusts that the said trustees should in manner therein mentioned raise and pay such further sum and sums of money, and unto such person and persons as the said Earl should by deed or will direct and appoint. But by the said indenture it was provided that the said Earl should have full power and authority, by deed or will, to revoke and make void all the uses limited by the said indenture, and to limit new uses thereof.

By indenture dated 10th of August 1743, made between said Earl of Bath, of the one part, and George Wilson, of the other part; reciting the said indentures of lease and release, and that the said Earl, for and in consideration of the many good services done and performed by the said George Wilson, to and for the said Ann Smyth in her lifetime, as well as to and for the said Earl, was desirous and had agreed to secure to be paid to the said George Wilson, his executors, administrators, and assigns, the sum of 2000*l.* at the time, and in the manner, and upon the contingency therein after expressed, it was witnessed that for, and in consideration of, the services so done and performed by the said George Wilson, and for the making a full recompence and satisfaction to the said George Wilson for the same, he the said Earl did direct and appoint the said Richard Mead and Robert Ord, their exe-

into possession, the trustee should raise 2000*l.* for W. and covenanted that if the estate tail should be spent in his own lifetime, then he would pay the 2000*l.* unto W.; but if not till after his death, and he should revoke the said term of 99 years, then that his heirs, executors, &c. should within a year after the estate tail, should be spent, pay the 2000*l.* to W. with a proviso, that if N. should suffer a recovery of the premises, and bar the remainder in fee, the 2000*l.* should not be payable. A afterwards by will revoked all the uses of the first settlement "*to all intents and purposes whatsoever, as if the same had never been limited.*" And thereby devised all the said premises, "*subject*

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cutors, &c. within one year next after the death of the said John Newport, and failure of issue of his body, and the commencement of the said term of 99 years in possession, to raise and levy, in manner mentioned in said indenture of release, the sum of 2000*l.* and pay the same to the said George Wilson, his executors, administrators, and assigns. And the said Earl did thereby covenant for himself, his heirs, executors, &c. with the said George Wilson, his executors, &c. that in case the said John Newport should die without issue, in the lifetime of the said Earl, so that the said Earl should become seized or entitled to the said premises in possession, then the said Earl should within one year next after he should so become entitled in possession, pay to the said George Wilson, his executors, &c. the sum of 2000*l.*; and that in case the said John Newport should not die without issue in the lifetime of the said Earl, or if the said John Newport should leave issue, which should afterwards fail, but not in the lifetime of the said Earl, and that the said Earl should in his lifetime revoke the said indentures, or the said term of 99 years, so that the said trustees should have no power to raise the said 2000*l.* or any part thereof, out of the said premises; and the heirs and assigns of the said Earl, or some person or persons claiming under him, should afterwards become seized of the said premises; then and in such case, the heirs, executors, and administrators of the said Earl should within one year, next after the death and failure of issue of the said John Newport as aforesaid pay or cause to be paid, to the said George Wilson, his executors, &c. the sum of 2000*l.* Proviso that if the said John Newport should suffer a recovery of the said premises, and bar the subsequent estates, then the said 2000*l.* should not be payable.

nevertheless to payment of the said sum of 2000*l. to W.*" in manner therein mentioned. A. died and afterwards N. died. The 2000*l.* remained a charge on the devised premises after the death of N. notwithstanding the revocation of the term, and the personal estate of A. was not applicable to it.

The Earl of Bath by his will dated 21st of May 1763, in pursuance of the power of revocation, reserved by the said indenture of release, revoked and made void all the uses trusts and limitations of the said premises by the said indenture created or declared *to all intents and purposes whatsoever, as if the same had never been made, created, or limited;* and he thereby gave and devised all the said

premises, &c. (*subject nevertheless* (amongst other things,) *to the payment of the aforesaid sum of* 2000*l. charged thereupon by the said Earl, for the benefit of the said George Wilson, his executors,* &c.) to his brother General Pulteney for life, with divers remainders over.

The Earl of Bath died 7 July 1764.

John Newport died without issue 29 April 1783, and at the expiration of one year after his death, the present plaintiffs filed their bill, claiming as devisees of the said George Wilson, to have the said 2000*l.* paid out of the personal estate of the said Earl, and the deficiency (if any) to be raised out of the real estates.

Hardinge, *Mitford*, and *Alexander*, for General Pulteney, insisted this money should be paid out of the personal estate.

The term of 99 years is absolutely and completely revoked by the will; no sort of direction is given for reserving any sort of estate whatever in the trustees, nor can they possibly act in the trusts of the term. It is said that the term is revived *pro tanto* by the words, "subject nevertheless to the payment of the aforesaid sum of 2000*l.* charged thereupon by the said Earl, for the benefit of the said George Wilson." But this construction directly contradicts the covenant in the deed of the 10th of August. If then the term is revoked, the covenant takes effect, and the plaintiffs have their action thereon; it is therefore become a debt, and the consequence is that the personal estate must discharge it.

His Honor was so clear in his opinion, that he did not hear the counsel for Lord Darlington, and the other executors of Lord Bath.

Master of the Rolls.—It is perfectly clear that where a debt exists, and the real estate is charged with the payment of it, nevertheless the personal estate shall be the primary fund to be resorted to, for the payment of it. On the other hand it is equally clear that where a power is created of charging a real estate, and the party does charge it, not in satisfaction of any existing debt, but in favour of a particular person, the real estate must resorted to. It appears by

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the recital of the deed, Wilson had performed good offices to Mrs. Smyth and Lord Bath; but the particulars of these good offices do not appear; I take it to have been altogether an act of bounty in Lord Bath; if it were really a debt, Lord Bath was not doing justice, for the fund out of which he was providing for the payment of it was contingent, and possibly might produce nothing. If then it is a mere bounty, to what fund shall the plaintiffs resort? A large property was probably to come to Lord Bath, which if it should come, he meant to be chargeable with this bounty to Mr. Wilson, and if he should come into possession of it in his lifetime, he was at liberty to withdraw the estate from the burthen. If he had barely revoked the term without any other words, no doubt the personal estate must have been resorted to; but there are some material words in the covenant in the deed of 10th August: "So that the said trus-"tees should have no power to raise the said 2000*l.* or any "part thereof out of the said premises." And in the will: "Subject nevertheless to the payment of the said 2000*l.* "&c." Perhaps the term was in point of form revoked; but I am clearly of opinion that the real estate was not intended to be withdrawn from the charge, and that it is liable to and ought to pay the 2000*l.*

In Linc. Inn Hall, Feb. 22, 1785.

FELL *versus* MORRIS.

A defendant may move to dismiss a bill at any time before a rule to produce witnesses.

Vide 3 *Atk.* 558.

The question was, whether the defendant could move to dismiss the bill for want of prosecution, after a subpœna to rejoin, by which means the cause was at issue. *Lloyd* said this motion might be made at any time before the rule to produce witnesses. And the *Lord Chancellor* agreed to this being the rule of the court, and was proceeding to make the order, when the plaintiff undertook to speed the cause.

HINCKLEY *versus* TOMKINSON.

In Linc. Inn Hall.
Feb. 22, 1785.

As to the practice of giving time to put in a further answer, after a submission to answer exceptions.

The defendant having obtained the three usual orders for time to answer, (six, four, and three weeks,) and having at last put in an insufficient answer, to which plaintiff excepted; and after order of reference to the Master the defendant having submitted to answer the exceptions, he obtained an order (as of course) for six weeks time, to put in this second answer. The present motion was made by *Richards* to discharge that order, as having given defendant a greater time than was warranted by the practice of the court. *The Lord Chancellor* said, he did not know any precise rule to be laid down in this cause. He would not therefore discharge the former order for irregularity; but he thought it ought to be peremptory.

PEARSON *versus* WARD.

In Linc. Inn Hall.
Feb. 28, 1785.

It is a ground for examining a witness *de bene esse*, that he is the *only* witness to some material fact in the court, although he be neither aged nor infirm. But the affidavit should state the particular points to which his evidence is meant to apply.

Plaintiff as administratrix of her late husband, having filed her bill against defendant, for an account of several considerable sums of money to the amount of 20,000*l.* and upwards, which (as plaintiff alleged by her bill) defendant owed to the estate of the husband in consequence of his having managed and conducted the husband's business for several years before his death on account of his great age and infirmity. Plaintiff now moved (before the coming in of the answer) to examine a witness *de bene esse*, on the ground of his being the only person who could prove the plaintiff's demands, the proposed witness having been the husband's book-keeper for several years. There was no pretence that he was likely to die, he being about thirty-six years old, and in good health; but it was urged chiefly on the authority of *Shirley* v. *Lord Ferrers*, 3 *Wms.* 77. and the

Grove v Young 3 Dea. & J. 398.

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importance of his testimony to the plaintiff. And the *Lord Chancellor* was of opinion that was sufficient ground to grant the motion upon; but he thought the affidavit did not go far enough, inasmuch as it was thereby only sworn generally, that the plaintiff had no other witness to support her demand; and did not specify in what particular manner his testimony affected the cause, or that he was the husband's book-keeper, &c.: if therefore the defendant insisted on the insufficiency of the affidavit, he could make no order until a fuller affidavit should be made.

But the defendant not insisting thereon, his Lordship granted the motion, but ordered that the defendant should be at liberty to cross examine the witness at the same time; as otherwise in case of the witness's death, before his examination in chief, the defendant might be materially prejudiced by want of such opportunity. And his Lordship ordered all the costs of both parties in such examination to be paid by plaintiff.—*Reg. Lib. B.* 1784, *fol.* 247.

In Linc. Inn Hall. Feb. 28, 1785.

JENNINGS *versus* WALKER.

Practice as to reference of an answer for impertinence, after an order *nisi* to dissolve an injunction.

An order having been obtained by the defendant at the preceding seal, to dissolve the injunction upon the coming in of the answer, unless cause, plaintiff this day moved to refer defendant's answer for impertinence. Defendant afterwards moved to make the order absolute for dissolving the injunction; but it was insisted by plaintiff, that a reference for impertinence staid all proceedings in the cause, and that if plaintiff had shewn exceptions for cause, he could not afterwards have referred the answer. And the *Lord Chancellor* agreed that nothing could be done until that reference should be disposed of; but he thought plaintiff should be bound to obtain the Master's report, in four days.

HEYSHAM *versus* HEYSHAM.

At the Rolls. March 17, 1785.

The plaintiff, who was an infant, filed his bill for an account of the rents and profits of real estates, to which he was entitled, and for a proper allowance to be made for his maintenance and education.

By order of 2d day of May 1783, it was referred to the Master to inquire, what was proper to be allowed for the maintenance and education of the plaintiff for the time past, from the death of his father, and for the time to come, and the Master was to state the same with his opinion thereon to the court.

The Master, by his report of 22d March 1784, certified that a proposal had been laid before him for the maintenance of the plaintiff, the infant, whereby it was set forth, that the plaintiff's father died on the 31st of August 1781, having by his will appointed the defendant Hannah Harriet Heysham executrix thereof, and also guardian of the plaintiff and his estate during his minority: and that he left the plaintiff his only son and heir at law, and Elizabeth Thornton Heysham an infant, his daughter, him surviving: that the plaintiff attained his age of 14 years, on the 15th of October 1783, that the plaintiff was seized in tail male of several estates in the counties of Hertford and Essex, of the clear yearly value of 1600*l.* or thereabouts; and the Master found that the sum of 315*l.* 6*s.* 5d. theretofore expended for the maintenance and education of the infant, by the defendant Hannah Harriet Heysham his mother, ought to be allowed her, and *that considering the circumstances and situation of the said defendant, Hannah Harriet Heysham* (a), *and of the said infant, the said Master conceived the sum of* 250*l. per annum was proper to be allowed for*

(a) It appeared by the proceedings that Hannah Harriet Heysham was insolvent, and she had on that ground been objected to as guardian.

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his maintenance and education, from the 25th day of December 1783 *to that time, and for the time to come.*

On the 5th of April 1784, this report was confirmed.

By an order made in the cause, dated 18th day of June 1784, it was referred to the said Master to appoint a proper person to have the care of the maintenance and education of the infant, and that he should inquire in what manner the plaintiff had been maintained and educated, and also to consider what part of the said sum of 250*l.* per annum, allowed for the maintenance and education of the plaintiff, would be necessary to be applied to that purpose, and that so much of the said sum of 250*l.* per annum, as the Master would find necessary for the maintenance and education of the plaintiff, should be applied for that purpose accordingly; *and that the residue of the said* 250*l. per annum. should be paid to the said Hannah Harriet Heysham, until further order.*

In pursuance of this order the Master, by his report of 14 December 1784, certified that he approved of Nehemiah Winter esquire to have the care of the maintenance and education of the plaintiff, and that he conceived the sum of 130*l.* per annum, part of the said sum of 250*l.* per annum, to be necessary to be applied for that purpose.

By order of 17th March 1785, this report was confirmed, and it was ordered "that 130*l.* per annum, part of the said 250*l.* per annum, should be paid to the said Nehemiah Winter, for the maintenance and education of the plaintiff, and that the residue thereof should be paid to the said Hannah Harriet Heysham, till further order."—*Reg. Lib. A.* 1783, *fol.* 575.

At the Rolls. April 18, 1785.

RIDGES *versus* MORRISON.

The court will not marshal or arrange assets in favour of a charitable bequest, within the statute of *mortmain.*

The only question now argued in this cause was, whether the court would marshal or make any arrangement of assets, so as to assist charitable legacies; and many manuscript cases were cited. *Mascall* v. *Ryves* in 1757, where the Court refused to marshal. *Attorney General* v *Martin,*

before Lord *Bathurst*, 26 March 1776, where the court *did* arrange the personal estate, so as to make good the legacies to a charity. *Hilyard* v. *Taylor* in 1773, on appeal from the Rolls, *Foster* v. *Blagden.* (*a*)

Mogg v. *Hodges*, 2 *Ves.* 52.

The Master of the Rolls said, that whatever difference of opinion there might have formerly been upon the subject, he considered it to have been the established law of the Court from Lord *Northington*'s time, not to marshal or arrange assets in favour of a charity. This was settled in the case of *Attorney General* v. *Tindall*, where Lord *Northington* reversed a decree of the *Master of the Rolls*, made in favour of the charity. There are many other cases, but particularly that of *Coleman* v. *Taylor*, in Lincoln's Inn Hall, 1765: in that case it was admitted on all hands, that assets could not be marshalled for a charity; and Lord *Northington* decreed the personal estate to be applied, as far as it would go, in discharge of all the legacies (charitable as well as others) *pari passu:* and of course the charitable legacies were defeated, as to all beyond what the personal estate extended to pay. In the present case therefore his Honour had no difficulty in declaring, that the charitable legacies were entitled only to be paid out of the personal estate *pari passu* with the other legacies.

(*a*) *Amb.* 704.

NIGHTINGALE *versus* LAWSON.

In Chancery. May 4, 1780.

Vide 1 Brown. Cha. Rep. 440.

In the judgment of the *Lord Chancellor*, as reported by Mr. Brown, there is an error in the printing, which makes it difficult to be understood.

In the following passage, "The Master ought to take "the sum paid by her for the renewal of the lease, as the "value of the term purchased, *to that of the term* of 28 "years, to commence at the expiration of 12 years;" instead of the words, "*to that of the term*, &c." it should have been, "*viz. the term*, &c."

In Court. Lord Chancellor. May 28, 1785.

EXPARTE CATHORPE.

LUNATIC PETITION.

The court will never permit any part of the lunatic's estate to be laid out on private security.

Upon an application to lay out on a mortgage a sum of 3000*l.* in the hands of the Accountant General, belonging to the lunatic's estate, *Madocks* produced several orders of the same nature, which had been made in this very lunacy. But the *Lord Chancellor* said, that although he was perfectly convinced, by what was stated to him, that this security was perfectly good, yet he could not permit such a precedent to be made: and that he was aware that in former times the Court had laid out the money not only of lunatics but of infants in this manner; but in latter times the Court had considered it as improper to invest any part of the lunatic's estate upon a private security, and it would be a dangerous precedent to break in upon that rule: and he therefore directed the money to be laid out in the 3 per cent. Bank annuities.

In Court. Lord Chancellor, June 7, 1785.

CATOR *versus* COOLEY.

The register of a mortgage will not by itself affect a subsequent incumbrance without notice.

Plaintiff being a third mortgagee without notice of the second mortgage, afterwards bought in the first mortgage, and brought this bill to foreclose the second mortgagee, unless he redeemed both the plaintiff's mortgages; and the single question made, was, whether the register of the 2d mortgage (the lands being in Middlesex) was of itself such a notice, as would affect the third mortgagee; but the counsel for the defendant admitted the point to be so well decided, that such register was not sufficient without actual notice, that the contrary could not now be maintained; to which the *Lord Chancellor* assented.

The only case mentioned was *Bedford* v. *Blackhouse*, 2 *Equ. Ca. abr.* 615. *pl.* 12.

In Court. Master of the Rolls for Lord Chancellor. June 10, 1785.

NORRIS *versus* NORRIS.

A trustee not appearing at the hearing of the cause, a decree was made against him with liberty for him to shew cause against it. He now set down the cause again, and prayed to have his costs of the suit, upon his paying the costs of the day. *Mansfield* objected that there was no instance of any party having his costs who did not appear; that the liberty given him to shew cause against the decree, was only to point out any errors in it, but the not giving him his costs was certainly no such error.

But the *Master of the Rolls* said, that his having paid the costs of the day made him *rectum in curiâ*, and that as he would most unquestionably have been entitled to his costs, if he had appeared at the original hearing, so he now stood in the same situation, and was therefore entitled to his costs of suit.

A trustee not appearing at the hearing of the cause, a decree was made against him, with liberty to shew cause against it. Under this order he set down the cause again, and prayed his costs, which were given him on paying the costs of the day on the former hearing.

In Court. Master of the Rolls for Lord Chancellor. June 10, 1785.

PARRY *versus* BOODLE.

John Nappier by will of 29th May 1777 gave to Charles Douglas a bond for 1000*l.* due from a Mr. Perrot to the testator; "but if he the said Charles Douglas *should not* "*be in life*, and there be certain intelligence thereof, he "willed that the abovementioned sum of 1000*l.* due from "Mr. Perrot should be equally divided between the two "plaintiffs."

Charles Douglas appeared to have been alive at the time of making the will, (although the testator had not intelligence thereof,) but he died in the testator's lifetime; and the residuary legatee now claimed this legacy of 1000*l.* as a lapsed legacy: and *Scott* for the residuary legatee insisted,

Testator gave 1000*l.* to D. but if D. *should not be alive*, and there be certain intelligence thereof, the testator willed that the same should be divided between A. and B. D. appeared to have been alive *at the time of the*

Parry v. *Boodle.*

that this money was given to the plaintiffs, only upon the event of Charles Douglas being dead at the time of making his will, and that, as he was then alive, they were not entitled.

will, but died in the lifetime of the testator. A. and B. are entitled to the 000 *l.*

The Master of the Rolls was very clear, that the plaintiffs were entitled to the legacy. There are many cases (he said) where devises of this sort are not considered as conditions precedent, but the party takes the benefit, whether the event has happened or not. As *Jones* v. *Westcomb, Prec. Cha.* 316. *Gulliver* v. *Wickett,* 1 *Wils.* 105. *Statham* v. *Bell,* (cited in Douglas 65.)

In Lincoln's Inn Hall. Lord Chancellor. June 29, 1785.

JONES *versus* JONES.

An application to read the deposition of a witness on the trial of an issue at law, directed by the Court of Chancery, on the ground of the witness being so aged and infirm, as to be unable to attend in person must be made to the Judge at the trial, and not to the Court which directs the issue.

Motion to read the deposition of a witness on a trial directed by this court at the next assizes at Shrewsbury, on an affidavit of his being above 80 years of age, and unable to attend in person: and in support of the motion it was said, that judges at Nisi Prius would not in such case receive such evidence, without an order from the Court which directs the trial: and particularly one instance was mentioned, where Mr. Justice *Blackstone* refused to admit such a deposition to be read, without an order from the Court of Exchequer, who directed the issue.

The Lord Chancellor said it was certainly the justice of the case, and the clear law, that such a deposition might be read, as if the witness were actually dead; but he thought the application should be to the judge who tried the cause, and not to this Court; and he therefore refused to make any order upon the subject, as he had frequently done before.

MORROW *versus* BUSH.

ON FURTHER DIRECTIONS.

In Lincoln's Inn Hall. Lord Chancellor. July 26, 1785.

Testator devised a part of his real estate to trustees in trust, to sell and pay certain debts mentioned in a schedule, and then devised all his personal estate to his wife, "fully "and clearly "exonerated "from all the "debts in the "schedule "specified." And he settled the residue of his real estate on his wife and child, in manner therein mentioned. The trust estate not being sufficient to pay the scheduled debts, the settled estates must be applied in exoneration of the personal estate.

Testator devised certain parts of his real estates to trustees in trust to sell and pay off a mortgage, affecting some other parts of his real estates, and also certain other debts specified in a schedule to his will. He then proceeded to settle his other real estates (part of which was the mortgaged estate) upon his wife and child, and other parts of his family, in manner therein mentioned. He then devised "all his personal estate to his wife, fully and "clearly exonerated from all his debts therein and in "the schedule specified, and from all funeral and testa- "mentary expenses." The estates devised in trust not being sufficient for the payment of the scheduled debts, the question was, whether the settled real estates, or the personal estate, should make good the deficiency, the scheduled debts being almost entirely due upon specialty.

On the one hand it was said; the personal estate ought to be applied as in the common case; for the exemption of the personal estate proceeded evidently upon the idea, that the testator had provided another fund for the payment of his debts, and was only meant to operate in respect of that fund so provided. The testator certainly meant that his family should take the settled estates, as much exempt from incumbrances, as his wife could take the personal estate. He did not foresee the possibility of the estates devised for the payment of his debts, being insufficient for that purpose, and he therefore made the words of exemption more general than he would have done otherwise. The exemption therefore being made with that view, and the devisees of the real and personal estates, being equally the object of the testator's bounty, the common rule should apply, and the personal estate be first applicable, or at least that they should contribute proportionably; as in *Long* v. *Short*, 1 *Wms.* 403. and *Haslewood* v. *Pope*, 3 *Wms.* 322.

Young v Young 2 Ves. sen. 528.

Morrow v. *Bush.*

But the *Lord Chancellor* was of opinion, that although the testator never had it in contemplation, that the settled estate would be burthened, (inasmuch as he conceived he had provided a sufficient fund for the payment of the debts,) and although he probably might have made the personal estate applicable before them, in case he had foreseen the event; yet the words of exemption were so express and general, that it was impossible to get rid of them, and the settled estates must therefore bear the burthen.

In Linc. Inn Hall. Lord Chancellor. July 27, 1785.

MALING *versus* HILL.

ON FURTHER DIRECTIONS.

Lands were settled on A. for life, remainder to his wife for life, remainder to their children, with a power of revocation and appointment to new uses by the husband and wife jointly: proviso that if A. should become bankrupt, &c. then the limitation to him for life should cease, and the lands should go to trustees during his life, for the benefit of his wife and children. A. agreed for the sale of this estate, and proposed to

Bill to compel the defendant specifically to perform an agreement for the purchase of some lands from plaintiff Maling. The abstract of plaintiff's title being laid before *Mr. Bradley* (a conveyancer) by the defendant, *Mr. Bradley* made the following objection to it: Upon the marriage of plaintiff the lands in question were settled to the use of himself for life, with remainder to the wife for life, with remainder over to the children of the marriage, with a power of revocation and appointment to new uses by the husband and wife jointly. Plaintiff being in trade, it was thought proper to insert in the settlement a proviso that in case the plaintiff should become bankrupt, or should suffer any losses in trade, by means of which his interest under the settlement should be liable to be affected, then the limitation to him for his life should cease; and the lands should go to trustees during his life, for the benefit of his wife and children, as therein mentioned. Under the above power of revocation, the present title was to be made to the defendant, but it occurred to *Mr. Bradley* that in case the plaintiff had committed any secret act of bankruptcy, or had by any means made his life estate subject to any debts or demands contracted in trade, such life estate would be

forfeited under the aforesaid proviso, and that the forfeiture of the interest would operate as an extinguishment of the power of revocation; and in support of this opinion he referred to *Co. Lit.* 237, *a.* where the distinction is taken between a power of revocation reserved to a person who takes an interest in the land, and one reserved to a stranger; and it is said, that if he, who hath any present interest in the lands, do make a feoffment in fee, or levy a fine, &c., all the power of revocation is extinguished; and *Mr. Bradley* therefore thought the defendant should have some indemnity against any such event having taken place. This opinion having been shewn by plaintiff to *Mr. Dunning* and *Mr. Phipps*, and two other conveyancers, on his part, they all agreed in thinking the objection groundless; but *Mr. Bradley* nevertheless retained his opinion, and supported it by a very long and elaborate argument, in answer to the concurring opinions of the other gentlemen.

Under these circumstances, the defendant declined proceeding in the purchase without a bond of indemnity to secure him against the difficulties suggested by *Mr. Bradley*. Plaintiff therefore filed this bill, and it was referred to a Master to see whether the plaintiff could make a good title to the lands. The Master reported that a good title could be made. No exceptions were taken to the report; but the cause coming on for further directions, it was insisted for the defendant, that it would be very hard under these circumstances to make the defendant pay costs, as he had so good reason for objecting to the title, as a decided opinion of a gentleman in the profession. But the *Lord Chancellor* said, he thought there was no ground for the objection, and that he could not allow the mistaken advice of a third person, to operate to the disadvantage of the party who was clearly in the right, and therefore gave the plaintiff his costs.

make title to the purchaser by executing this power of revocation. The conveyancer on the part of the purchaser required an indemnity against A.'s having committed any secret acts of bankruptcy, for that the power of revocation would be extinguished by the forfeiture of the life interest of A. On a bill filed by A. to compel the performance of this contract, the court thought there was no ground for the objection, and that the mistake in opinion of the conveyancer could not save the defendant from costs.

At the Rolls. Sir Lloyd Kenyon. Nov. 8th and 10th, 1785.

DEVESE *versus* PONTET.

This cause was originaly set down before his Honour as a cause by consent in Trinity Term last, but his Honour, conceiving it to be a case of some difficulty, directed it to stand in the general paper of causes to be heard in the term.

On marriage the husband covenanted that if the wife should survive him and there should be no issue, his executors should within nine months after his death, pay to the wife 800l. for her own use, but if there should be issue, then the 800*l.* should be laid out by the trustees, and the interest paid to the wife for life, and after her death the principal divided amongst the children. There was no issue of the marriage. The husband by his will bequeathed one moiety of certain articles of his personal estate to his wife, which moiety greatly exceeded in value the sum of 800*l.* This bequest will not amount to a performance

By articles made previously to the marriage of Felix Devese (who was a foreigner and lace dealer) with Barbara Gillanders, reciting that they had contracted marriage together; they therefore mutually covenanted to intermarry together, under a penalty of 200*l.* and the *articles* then proceeded thus: "And in contemplation of the said intended marriage, and in consideration thereof, and of the marriage portion of 200*l.* which the said Felix Devese will have with the said Barbara Gillanders, and in order to make some provision for her, and the issue of the said marriage, the said Felix Devese doth hereby for himself, his executors, and administrators, covenant, promise, and agree to, and with the said Louis Beauvois (a trustee), his executors, administrators, and assigns, in manner following (that is to say), that if the said intended marriage shall take effect and be duly had and solemnized, and the said Barbara Gillanders shall survive her said intended husband, and there shall be no issue of the said marriage living or born in due time afterwards, that the heirs, executors, or administrators of the said Felix Devese shall and will, *within nine months after his death*, pay or cause to be paid unto the said Barbara Gillanders, her executors, administrators, and assigns, the full and just sum of 800*l.* of lawful money of Great Britain, to and for her own proper use, and to be at her own disposal; and if it shall happen that the said Barbara Gillanders shall survive her said intended husband, and there shall be then living one or more child or children of the said Felix Devese by the said Barbara Gillanders, or a child born in due time afterwards, then and in such case

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the heirs, executors, and administrators of the said Felix Devese shall and will, within nine months after his death, pay or cause to be paid unto the said Louis Beauvois, his executors, administrators, and assigns, the full and just sum of 800*l.* of lawful money of Great Britain, upon trust that the said Louis Beauvois, his executors, shall and do invest and lay out the said 800*l.* on government or real securities, at interest, and pay such interest unto the said Barbara Gillanders for and during the term of her natural life, as the same shall from time to time grow due and payable; and from and immediately after her decease shall pay and apply the said 800*l.* to and amongst the children of the said marriage," in manner therein mentioned.

or a satisfaction of the covenant contained in the marriage settlement. The gift of a residue is never considered as a satisfaction of a certain provision made for a wife on marriage, although it may in the event turn out more beneficial.

Felix Devese died in the year 1783, leaving the said Barbara surviving him, but there was no issue of the marriage. About two years before his death he made his will as follows: "May 17th 1781. In the name of the Holy Trinity and under the fear of God, I Felix Devese being in free and good mind and perfect health, and considering the uncertainties of this life, and being willing to give and dispose of what, by God's blessing, I am now or shall hereafter be possessed, to my relations, I herein make this my last will and testament as follows: I leave and bequeath to my dearly beloved wife Barbara Devese, all the jewels and watches that she has now in possession. I furthermore give her all the plate that shall be found in my house at my decease. And as the business that is carried on is a very precarious business, I desire, and it is my will, that all the debts due to the said business shall be collected as soon as possible, that the stock in trade and household goods shall be valued, and likewise the horses and chaise that shall at that time be existent, and the money that shall be in the public funds. The produce of all being collected, I hereby desire that it shall be divided into two equal shares, the one to be the property of my dearly beloved wife, Barbara Devese, for her to dispose as she pleases; the other to be devolved to my dear brother Peter Devese; for I do hereby appoint him my heir general; but I shall

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beg of the executors that I shall hereafter mention, to take upon themselves to see what share of my estate and property which shall become my brother's share properly placed in some secure safe public funds, so that the interest only thereof shall be enjoyed by him, his heirs, and executors; but the capital to remain whole and entire, except only that on the marriage of any of his daughters, a reasonable sum may be taken out for that purpose, with the consent of two of the executors of this my will. And I therefore appoint executors thereof, Mr. Porter of Pall Mall, Mr. Francis Gillanders, and Mr. Luke Wellen, and desire twenty guineas shall be paid each of them for a ring."

It was a fact admitted by all parties, that the moiety of the stock in trade, debts, household goods, and other articles, the produce of which is directed to be divided as aforesaid, considerably exceeded the sum of 800*l.* And the first question was, whether the moiety given by the will to the wife should be considered as a performance of, or a satisfaction for, the covenant in the marriage articles to pay her 800*l.* within nine months after the testator's decease.

Master of the Rolls, after stating the case.—As I have given this case great consideration, I do not wish to avoid giving my opinion in this stage of the business, which I might perhaps do by a reference to the Master.

The first and main question is, whether the disposition by will in favour of the wife is either a performance or satisfaction of what the husband had agreed to do by the marriage articles. It has been argued in both ways. How far it can be a performance, must depend upon the words of the covenant; he had stipulated that his heirs, executors, and administrators shall within nine months after his death pay a sum of 800*l.* I cannot see how this delivery of certain specific articles can be considered a legal performance; several cases have been cited for the purpose, and if they had established any principle, I should have been glad to have applied it to the present case. The principle which Lord *Cowper* proceeded upon in *Blandy* v. *Widmore* was, that what was done was a performance

in *specie*. It has been doubted whether Lord *Hardwicke* proceeded on the same idea in *Lee* v. *D'Aranda*: but in *Barrett* v. *Beckford*, 1 *Ves.* 519, Lord *Hardwicke* certainly conceived that to have been the ground of his decision in *Lee* v. *D'Aranda*, which was the ground of Lord *Cowper's* in *Blandy* v. *Widmore*; but the present case seems nothing like performance in specie. Then to consider it as a satisfaction: all Chancellors have regretted that the idea of satisfaction has been carried so far. In *Goodfellow* v. *Burchett*, 2 *Vern.* 298, Lord *Somers* said, "Cases of this nature depend upon circumstances, and where a legacy has been decreed to go in satisfaction of a debt, it must be grounded on some evidence, or at least a strong presumption, that the testator did so intend it." So in *Forrester's Report* of *Lechmere* v. *Lechmere*, *C. T. T.* 92, it is said, that satisfaction depends upon the intent of the party. When first I heard this cause, I thought it was a satisfaction, but I am not ashamed to own I have changed my mind since that time. If the principle be as said by Lord *Somers* in *Goodfellow* v. *Burchett*, that the party who insists on the point of satisfaction must give evidence of the intention of the testator for that purpose, what evidence can I find in the present case? It has been said, that I shall break in upon the disposition made by the will, if I decree the wife both the debt and legacy. If that were so, I should have yielded; for the doctrine of *Noys* v. *Mordaunt* I most certainly agree to: but I feel nothing of this kind in the present case. He has directed *all his debts* first to be paid. What he meant to dispose of was what remained after payment of his debts. Therefore this will not interfere with what he meant to dispose of. But had he in contemplation to satisfy the covenant? There were two provisions made by the articles; one in case of no issue, the other in case of issue. If when he made his will, he had intended to satisfy the covenant, he would have done so *in toto*. Yet if the wife had then been *ensient*, the second part of the covenant would not have been satisfied. If therefore the slightest circumstances are to be laid hold of, I

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may take in aid these circumstances to make it doubtful whether he meant to satisfy the covenant, and in that case I may say, as Lord *Thurlow* did in *Haynes* v. *Micoe*, "*Incumbit onus petitori*," that is, the person who says it is a satisfaction. Another ground is, that an unliquidated residue has never been taken as a satisfaction. Where a positive sum is given, it may be conceived that the testator so intended, but where it is to wait the result, perhaps of a long protracted suit in Chancery, it never can be meant so. It must be argued that the party is to wait the event for years, and then if the sum is equal to the debt it must be taken in satisfaction. But this is denied in *Barrett* v. *Beckford*. Now how does the present case differ? Here, although what is given the wife is not the general residue, yet the gift of the particular residue may have just the same effect in entangling her in difficulties and uncertainties. On the principle therefore of Lord *Somers* and Lord *Hardwicke*, that a residue shall not be taken in satisfaction, I am of opinion, that the covenant in the marriage articles is not satisfied by the provision of the will.

As to the next point, I am of opinion, that the gift to the wife includes only a moiety of the enumerated articles, and not a moiety of the general reside.

The next question is between the brother, Peter Devese, and his two daughters. The daughters insist that they have some interest vested in them by the will. The testator was a foreigner, and he conceived he could make his personal estate unalienable, and that it might so remain for ever; but the law is not so. He has attempted an impossible thing: therefore the whole went to the brother absolutely, and the rest of the clause was merely giving him a *facultas agendi* with regard to portioning his daughters; but now they come into court to insist on a right. The testator might have given it over to the daughters, but he has not done so, and therefore they have no claim as a matter of right.

The result is, that I must declare the wife entitled to one moiety of the several enumerated articles given her

by the will, and also to the provision made for her by the marriage articles; and that the other moiety of the articles, and the general residue vested in the brother Peter absolutely. The costs of all parties to come out of the assets of the testator.

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FREDERICK *versus* HARTWELL.

At the Rolls, Sir Lloyd Kenyon. Nov. 30, 1788.

A sum of money in the public funds being given by will to trustees for the separate use of a *femme coverte*, and to be subject to her appointment after her death; the wife made an appointment of this money to her husband; and on bill filed by husband and wife against the trustees to transfer this fund, the court on examination of the wife decreed the same accordingly.

Mary Mervyn, by will of the 2d of August 1780, gave and bequeathed to the defendant, Broderick Hartwell and Robert Bayley 5000*l.* 4 per cent. bank annuities, "In trust to permit (the plaintiff) Ann, wife of (the plaintiff) Thomas Frederick, to receive the dividends and produce thereof during her natural life, separate and apart from her present, or any future husband, and after her death, upon trust, as to the capital stock to and for the use of such person or persons to whom (the plaintiff) Ann should, by deed or will duly executed, give, assign, or appoint the same or any part thereof, notwithstanding her coverture, and in default of such disposal, upon trust to and for the legal representatives of (the plaintiff) Ann in a course of administration."

Mr. Frederick and his wife filed this bill, stating that a very ample provision had been made for Mrs. Frederick on the marriage, in case she should servive her husband, and that she being desirous that the 5000l. 4 per cents. should be transferred to Mr. Frederick, she had by her deed in writing, dated 1st July 1785, appointed and directed, that the said 5000*l.* stock and the dividends thereof should be paid to Mr. Frederick, and directed the said Broderick Hartwell and Robert Bayley to transfer the same to him immediately, and praying that the said defendants might make out such transfer accordingly.

And the plaintiff, Mrs. Frederick, being examined in court, and consenting, and desiring that the said 5000*l.* should be transferred to her said husband, his Honour decreed the said defendants to transfer the same accordingly.

In Linc. Inn Hall. Lord Chancellor. Dec. 5, 1785.

AMBROSE *versus* AMBROSE.

The deposit made upon opening a bidding is considered as part of the purchase money paid, although on the event of the depositor not being reported the best bidder it must be returned to him, and therefore where the deposit is laid out in the public funds, which rise between the time of the deposit and the purchase being completed, the estate will have the benefit of the rise.

A bidding for an estate, sold before the Master, having been opened upon an undertaking to bid a certain further sum, the usual order was made, and a deposit of *1500l.* directed to be made; which money was afterwards, by the consent of all parties, (but upon the application of the seller) invested in the public funds. The depositor being afterwards confirmed purchaser of the premises, and the stocks having arisen very considerably in the meantime, the question was, who should have the benefit of the rise, that is, whether this deposit was to be considered as a mere pledge or security on the part of the depositor, or as part of the purchase money paid in advance. *Lord Chancellor* said, he did not recollect the point having been made before; that he at present conceived this was to be considered as part of the purchase money, and that it could *not* be treated as a collateral pledge; that as the party who makes the deposit is bound to bid a certain sum, this money was (in the event of his being confirmed the purchaser), to be taken as a discharge *pro tanto*.

In Chancery. Nov 28, 1785. Lord Thurlow.

POPE *versus* WARD.

COPY OF ORDER OF SEQUESTRATION.

"Upon motion this day made unto this court by *Mr.* "*Hollist*, of counsel for the defendant, it was alleged that "Benjamin Pope, the plaintiff, being in contempt to an "attachment for not paying to the defendant the sum of "*33l.* 16*s.* 2*d.* costs, pursuant to an order dated the 31st "day of May last; and the said plaintiff being brought "into this court by *habeas corpus cum causis*, directed

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"to the Marshal of the Marshalsea of his Majesty's "Court of King's Bench, to answer the said contempt, "and persisting therein, by an order dated the 24th day "of November instant, it was ordered that he should be "turned over to his Majesty's prison of the Fleet, where he "now remains, as appears by the certificate of the Warden "of the Fleet, dated this day; that the plaintiff hath not "paid, and still refuses to pay the said sum of 33*l.* 16*s.* 2*d.* "and it was therefore prayed, and it is thereupon ordered "that a commission of sequestration do issue, directed to "certain Commissioners, to be therein named, to sequester "the said plaintiff's personal estate, and the rents, issues, "and profits of his real estate, until the said plaintiff "shall fully pay the said sum of 33*l.* 16*s.* 2*d.* costs, "clear his contempt, and this court make other order to "the contrary."

N. B. Mr. Pope was in execution for a sum of 10,000*l.* recovered against him by Sir Alexander Leith in an action for a malicious prosecution, Pope having indicted Sir Alexander for felony.

MILNER *versus* GOOLDEN.

In Linc. Inn Hall, Lord Chancellor. Dec. 16, 1785.

DEMURRER.

Bill stated the plaintiff to be entitled to certain benefits, under the will of which the defendant was executor: that a bill was filed for an account of the personal estate, &c. and a decree hav-

The bill stated the will of Aaron Goolden, in which the plaintiff had a specific legacy of household goods in his own right, and was also entitled in right of his wife to one-fourth part of his residue of the personal estate; and of which will the defendant Goolden was executor: that the plaintiff and his wife, together with the other residuary legatees, filed a bill in this court for an account of the personal estate, &c. and to have the residue applied in fourths: that the cause came on to be heard in 1784, when the common decree was made for taking the several

Milner v. *Goolden.*

ing been made the plaintiff was charged before the Master with several articles of the personal estate possessed by him; that the account between them was afterwards referred to an arbitrator, who found a small sum in favour of the plaintiffs, but never made an award; that after this the defendant, as executor, brought an action against the plaintiff for the effects so possessed by him. And the bill prayed an injunction, and that the value of the articles possessed by plaintiff might be deducted out of the interest taken by him under the will. To this bill there was a demurrer for want of equity, which was over-ruled.

accounts, and further directions were reserved; that in the course of taking such account the defendant carried in divers charges against the plaintiff, as having possessed himself of several parts of the personal estate, in part of his wife's share of the residue, which the plaintiff admitted: that it was referred to an arbitrator to settle all matters of account between plaintiff and defendant as executor, when the arbitrator found a balance of 6*s*. 9*d*. due to the plaintiff, but no regular award was ever made: that the defendant afterwards brought an action at law against the plaintiff for goods sold and delivered, and money had and received, and upon trial of such action recovered a verdict of 18*l*. that the several articles upon which the defendant recovered the verdict at law, were the same with which the defendant charged the plaintiff before the Master, which ought to be deducted out of plaintiff's share of the residue, and which plaintiff is ready and willing to allow in such account. And the bill therefore prayed an injunction against the defendant to prevent his taking out execution on his judgment.

To this bill defendant demurred, and for cause shewed that it does not appear by the said bill, that the plaintiff is by the decree made in this court ordered to pay any sum of money on account to any person whatsoever, and that the said plaintiff's bill does not contain any matter of equity.

Scott for the demurrer.—The whole case amounts to this; that two parties being indebted to each other on separate accounts, and the plaintiff's demand not being liquidated, the defendant brings his action at law, and recovers his demand as he has a right to, and it is difficult to conceive what equity can arise to prevent his so doing.

Attorney-General, against the demurrer.—The defendant has already claimed and obtained an allowance for these goods in a cause instituted by plaintiff, as residuary legatee against defendant as executor. It is therefore clearly against conscience that he should afterwards proceed to recover the value of these goods at law. It was impossible for us

to come into a court of equity for the injunction before verdict, for till then it was impossible for us to know what were the articles, upon which the defendant founded his claim at law. It is true that the plaintiff is not directly made an accounting party by the decree; and therefore if the defendant had thought proper to have proceeded originally at law, he certainly might so have done; but instead of this he has made the charge before the Master, and *he* therefore has made the plaintiff an accounting party.

Milner v. *Goolden.*

The Lord Chancellor said, he thought the case made by the bill was sufficient to entitle the plaintiff to the injunction, till the Master made his report, and therefore he overruled the demurrer.

GUN *versus* PRIOR.

In Lincoln's Inn Hall, Lord Chancellor. Dec. 16, 1785.

PLEA.

Where a bill is filed by a person claiming as heir at law, *Quere*, whether a plea that the plaintiff is not heir is a good plea? It seems that if the plea goes on to state a pedigree by way of shewing that the plaintiff is not heir, and adds at the end, that the plaintiff is not in manner aforesaid, *or*

Bill stated the plaintiff to be heir at law of Ann Allen who died intestate, seized of the premises in question, which thereupon descended on plaintiff; that defendants had in their possession the several title deeds of the said premises, and praying that they might have them delivered up. There was a charge in the bill (as evidence of the plaintiff's title as heir at law) that one of the defendants came three several times to the plaintiff, and offered him 300*l.* to give up his right or claim as heir.

To the whole of the bill the defendants pleaded in bar, that plaintiff was not heir at law of the said Ann Allen, for that he was only second cousin of the half blood (stating the pedigree particularly,) and that he was not *in any other manner related to the said Ann Allen.*

Mansfield and *Spranger* for the plea.

Although no case appears in the books in point to the

Gun v. *Prior*

in any other manner heir, this is a good plea *in point of form*, although the title of the plaintiff is not concluded by the pedigree.

present, yet it seems to bear so strong an analogy to a plea, that plaintiff is not administrator (he having filed his bill in that right) that it can hardly be doubted, that the present plea is good. That it is a good plea as to an administrator, vide *Pract. Reg.* 276. (which indeed mentions *heir.*) *Winn* v. *Fletcher*, 1 *Vern.* 473. and *Ord.* v. *Williamson* in 1773, where to a bill filed by a plaintiff, as administrator of Ann Salkeld, it was pleaded that Ann Salkeld was still alive, and therefore plaintiff was not administrator, and the plea was allowed. But independent of any authority, the inconvenience attending the disallowing this plea would be sufficient to induce the court to make the precedent. It would enable any person who chose to state himself to be an heir law, to compel an answer as to any question he might think fit to ask about an estate; whereas a plea might possibly destroy all right in him to come into this court, and shew that all further proceedings must be altogether useless.

Scott and *Richards* contrá.

The business of a plea is to confess the facts stated in the bill, and avoid them by some collateral fact; but here the bill states the plaintiff to be heir of Ann Allen, and the plea denies it, which cannot be. There is no precedent for such a plea as this, and the case of an administrator is certainly very different; for that fact must turn upon the production of a single instrument, whereas the question of being heir at law, may involve great variety of matter, and go to a much greater extent: but in the present case, the charge made by the bill of the offer of 300*l.* is a very material fact, and ought certainly to be answered in support of the plea.

Lord Chancellor said, that this plea would not be good as a plea in bar, though it might be so as a plea in abatement. If that had been the only objection, he would have given the defendants an opportunity of amending their plea. But he had great doubts, whether it was a case analogous to that of administrator, for the reasons mentioned by Mr. Richards in the argument: however, in the present instance, he thought the charge of the offer of 300*l.* was a

fact which ought to be answered, and upon that ground disallowed the plea.

Gun v. Prior.

His lordship seemed to have some doubt, whether the plea went far enough to shew that in all events the plaintiff could not be heir at law to Ann Allen; for although it appeared to be so by the pedigree as stated by the plea, yet it did not follow that if it had been stated further back, it might not have appeared otherwise: and the averment that the plaintiff is not heir, seems he made as a deduction only from those premises; in answer to which it was observed, that the plea went on to say that, the plaintiff "was in no other manner" related; with which his Lordship seemed satisfied, and disallowed the plea on the ground aforesaid.

JONES *versus* LEWIS.

In Lincoln's Inn Hall, Lord Chancellor. Jan. 13, 1786.

A bill for a specific performance of an agreement was made necessary by a trustee refusing to join in the conveyance. The court being of opinion, that the trustee ought to pay all the costs of the suit, the decree was that the plaintiff should pay the costs of all the other defendants, (*although he had a decree against them*;) and recover

Bill for specific performance of an agreement for sale of an estate, agreed to be sold to plaintiff by the defendants, Lewis and his wife. The defendants by their answer stated themselves to be willing to perform their agreement, but they could not prevail upon one Davis, who was a trustee for them, to join in making a title. Davis appeared to have behaved so ill, that the Court thought he ought to pay all the costs. The minutes as taken by the register were, that the plaintiff should pay the costs of all parties, except Lewis and Davis, and should have them over from Davis.

Upon motion now made to rectify the minutes in respect of Lewis's costs, it was said to have been clearly the intention of the court, that Davis should pay the costs of Lewis as well as those of the other defendants. The *Lord Chancellor* said he supposed the doubt to have been how far it was regular in point of form, to direct the plaintiff to pay costs to defendant Lewis, when plaintiff at the same

Price v Leaden 21 Rear. 511.
Palairet v Carew 32 Rear. 566.

Jones v. *Lewis.*

time obtained a decree against him; but he thought this was according to the course of the court, and rectified the minutes accordingly.

over the whole costs from the defendant, the trustee,

In Lincoln's Inn Hall. Lord Chancellor. Jan. 21, 1786.

EXPARTE SYMONDS.

PETITION IN BANKRUPTCY.

Where a bond was in form only a joint bond, but it was suggested to have been the intention of the parties to make it joint and several, the court referred it to the Master, to inquire whether this was the intention of the parties. Where such intention appears on the *face of the bond*, the court will treat it as a joint and several bond, although it is only a joint bond in form.

Mason and Woods had executed a joint bond to petitioner. This was an application to prove this debt under the separate commission of Woods, upon suggestion that the bond was intended to be *joint and several*, and there was an affidavit of the petitioner to that effect: and *Mudocks* cited *Simpson* v. *Vaughan*, 2 *Atk.* 31. in support of the petition; and *Scott* mentioned four cases of this kind which came before the *Lords Commissioners* the same morning, when liberty was given to the obligee to prove the debt as a several one, although the form of the bond was that of a joint obligation only; but in those cases there were circumstances appearing on the face of the bonds themselves, which induced the court to believe they were meant to be joint and several. In the present case the bond was filled up by the parties themselves, who were not conversant in business, or likely to know the effect of a joint bond in distinction from a joint and several one.

The Lord Chancellor said, he did not by any means conceive that parties were to be presumed to mean a joint and several bond in all cases, where they happened to be persons ignorant of the legal effect of these instruments. Wherever there are circumstances appearing *on the face of the bond*, to shew that it was intended to be joint and several, though in point of form it was only a joint bond, there is no difference between a court of law, and a court of equity; the former would consider it as a joint and several bond, as

readily as the latter; but upon the head of mistake, a court of equity would go further than court of law; and if this instrument was really intended to be different from what it now appears to be, it is a very proper subject for the interference of the court. Therefore let the Master inquire whether the parties meant this bond to be joint and several.

Exparte Symonds.

EXPARTE WOODMAN.

In Lincoln's Inn Hall, Lord Chancellor. Jan. 21, 1784.

PETITION IN BANKRUPTCY.

The petitioner proved a debt on a bill of exchange, and also a debt for goods sold to the bankrupt. He afterwards received a full satisfaction on the bill of exchange, from some other of the parties liable thereon: it was doubted whether the petitioner should remain a creditor for the whole sum he had proved, (so as altogether not to receive more than the sum due) upon the principle in *Exparte Wildman*, 1 *Atk.* 110. or whether he should remain creditor for the other debt only; and the *Lord Chancellor* considered them as totally distinct, and that the petitioner having been fully satisfied in respect of the bill of exchange, could not receive any dividend in respect thereof.

A. was a creditor of a bankrupt on a bill of exchange, and also on a simple contract debt and proved both debts under the commission. He afterwards received 20*s.* in the pound, on the bill of exchange from the other parties liable thereon.

He cannot take a dividend on his whole debt proved (although it should not amount to 20*s.* in the pound on the remaining debt,) but only on the remaining debt.

In Court, Lord Chancellor. Jan. 23, 1786.

HOLWORTHY *versus* MORTLOCK AND ALLEN.

HOLWORTHY *versus* RUSSELL AND ALLEN.

A bill was dismissed with costs against one of the defendants. At that time the plaintiff had recovered a verdict at law, and entered up judgment against that defendant for a much larger sum, and he now applied that these costs might be deducted out of the money due on this judgment, on affidavit of the insolvency of the defendant; but the court refused to make any order. The court will not consider the lien of the clerk in court, on the costs on any collateral application between the parties, but the clerk in court must make his claim.

Notice of motion, "That the Master to whom it is referred, to tax the costs of the defendants on dismission of the supplemental bill in the said first mentioned cause for want of prosecution, may distinguish in his report of the said costs what parts thereof are taxed in respect of the said costs of the said defendant Robert Allen; and that the said plaintiff Matthew Holworthy may be at liberty to deduct and retain the said costs which shall be so reported due for the said defendant Allen's share of the said costs in that cause, and also the costs which shall be reported due to the said defendant Allen in the second cause, out of the sum of 460*l.* remaining due to the said plaintiff Holworthy, from the said defendant Allen, for principal and interest up to the 7th day of November last, on a bond from the said Robert Allen to the plaintiff, bearing date the 7th day of November 1781, in the penalty of 1000*l.* conditioned for the payment of 500*l.* with interest on the 7th day of May then next ensuing, and which said sum of 500*l.* and interest was further secured by the said Robert Allen's warrant of attorney, for confessing judgment on the said bond, and on which said bond and warrant of attorney, a judgment was recovered by the said plaintiff against the said Robert Allen in his Majesty's Court of King's Bench, and duly entered of Record as of Michaelmas Term 1782, for the said debt of 500*l.* with costs."

In support of this motion were affidavits stating the bad circumstances of Allen, and the plaintiffs belief that unless he should be permitted to retain these costs, he never should recover any satisfaction for any part of the said debt; and it was argued on the hardship of permitting the

defendant to take out an attachment against plaintiff for these costs, where he was so much more considerably indebted to the said plaintiff in another respect.

Holworthy v *Mortlock.*

On the other side there was an affidavit of the defendant Allen, that the plaintiff was very considerably indebted to the estate of one Hushwaite, of whom the defendant Allen was executor, but no particular sum was sworn to.

And the motion was objected to, on the ground of the inconvenience which would arise from the court's going into an adjustment of cross demands upon an application of this sort; and also in respect of the lien which the defendant's clerk in court had upon these costs, for which purpose the *Anon.* case, 2 *Vez.* 25, was mentioned.

The Lord Chancellor said, he did not conceive the lien of the clerk in court to be any objection to the present application; for he did not understand that such a lien was to be taken notice of, except upon a direct application for that purpose: but upon the more general ground, the motion was new in itself, and might be attended with great inconveniences; and his Lordship did not care to make the precedent.

DANVERS *versus* MANNING.

In Court, Lord Chancellor. Jan. 25, 1786.

For Case and Arguments, vide 2 *Brown. Cha. Rep.* 18.

Lord Chancellor.—Upon the whole I think the best construction is that contended for by the defendants. The form of the will is a disposition of all the testator's estate taking into consideration every particular fund of real and personal estate, and making a disposition of each particular fund; and he then makes a disposition of the general residue, contradistinguishing it not only from legacies, but also from particular funds. The question is between the general residue and the particular residue of one fund. After giving to Mrs. Foljambe a legacy, (which is clearly a money legacy, and out of the present question,) he gives

D. being possessed of 4000*l.* 4 per cent. Bank annuities, by his will gave parts of it to a number of persons; he then made a codicil in which he said, "I find willed away only

Danvers v. Manning.

5600*l.* 4 per cent. Bank annuities, and I have there at present 6000*l.* I give the interest of *the remaining* 400*l. to F.*" It appeared that he had disposed of only 3200*l.* of the stock by his will. F. shall take the whole residue of the stock under the bequest in the codicil.

to five ladies 500*l.* apiece, "of his 4 per cents. consol. Bank annuities," which carries so much of those Bank annuities. He then gives the several legacies to the Danvers family, 100*l.* to Mrs. Lindegreen and 100*l.* to Mrs. Bennett, and then adds, "to be paid from the 4 per cent. Bank annuities." Then the question is to what these words relate: it has been attempted to confine them to Mrs. Bennett's legacy only; but this, though not absolutely repugnant to any part of the will, yet seems inconsistent in some degree with the apparent intention to distribute the particular funds. Then come the legacies, amounting together to 600*l.* which consist of a variety of small sums, which he directs to be paid *out of the 4 per cents. for what the said annuities will fetch*. It has been properly argued, that if he meant so much stock to each legatee, the obvious direction to the executors, would have been to transfer so much stock to each, and it is difficult to say he goes from the obvious expression to a different one, without imputing some difference of intention: but I think his intention as to all these small sums to his servants, &c. was this, that they were not to be given to them in that shape in which they could not conveniently be enjoyed by the persons to whom they were given; but he directed the executors to sell annuities for what they would fetch, and to pay the legatees the produce. Then follow the words "I mean the same to all the rest of the legacies, &c." Now it is plain he meant *some* of the former legacies to be paid in stock; but the question is, whether he meant to include all the legacies which amount to 4800*l.* or only the first class, (that is, the five legacies to the five ladies) and the third class, (that is, the small legacies amounting to 600*l.*) and Mrs. Bennett's legacy of the 2d class, which would make the amount 3200*l.* Now it is difficult in such a will as this to say, that the testator's intention was manifest; but it seems probable that he meant by these words to refer to all the legacies in the second class. In the codicil he states expressly that he had given away 5600*l.* of the 4 per cent. and that he had 400*l.* of the 6000*l.* remaining. Now those who contend that he meant to give money legacies out of this

particular fund, must admit that he had not made an exact calculation. As to the idea, that the testator reasoned from the price of the 4 per cents. that it would require 5600*l.* stock, to pay the 4800*l.* as money legacies, the vice in this argument is, that it directly contradicts (at least) the five legacies of 500*l.* in the first class, which are expressly given as legacies of stock. Upon the whole, although the testator has miscomputed this residue, and probably he did not mean Mrs. Foljambe to take so much, yet I think when I declare her to be entitled to the whole of this particular residue, it will be nearer the point of the testator's intention, than any of the constructions contended for against it.

Danvers v. Manning.

BLACKBEARD *versus* LINDIGREN.

In Court, Lord Chancellor. Jan. 31, 1786.

On sale of an estate before the Master for payment of the creditors, A. was reported to be the best bidder at the sum of 13,000*l.* Before the report was confirmed it was found out, that A. was insane at the time of the bidding. *Mitford* now moved on behalf of all the parties in the cause, that A. might be discharged from his purchase, and that B. who was the next best bidder at 12,350*l.* might be reported the best purchaser; and it was suggested that if any persons were inclined to give more they might apply in the common way to open the bidding. To this motion B. consented. But the *Lord Chancellor* conceived this to be irregular, and that the proper way would be to order the estate to be re-sold and B. to stand a bidder at 12,350*l.*; but this B. declined to do, unless it should be ordered that he should be reported the best bidder at that sum; and thereupon it was ordered that the estate should be re-sold generally, notwithstanding the parties in the cause expressed their apprehensions that the estate would not sell for so much as 12,000 to any other person.

Estate sold before the Master for payment of debts, and A. reported the best bidder. Before the report was confirmed, it was discovered that A. was insane at the time of the bidding. It was moved on behalf of all the parties in the cause, that B. the next best bidder might be reported the purchaser at the sum bidden by him, and B. consented; but the court thought this was irregular, and directed the estate to be re-sold generally.

In Court, Lord Chancellor.
Feb. 9, 1786.

D'OYLEY *versus* COUNTESS OF POWIS.

A deposit made on opening a bidding having been laid out in the public funds, this deposit is considered as part of the purchase money paid, and therefore the depositor is not entitled to the dividends accruing between the time of the deposit and the completion of the purchase; but only to interest on the deposit at 4 per cent.

An estate having been sold before the Master in 1775 for a sum of 22,000l. and upwards, the bidding was opened on the motion of *Lord Beauchamp*, who offered 23,000*l.* for the premises, and an order was made accordingly on *Lord Beauchamp*'s undertaking to bid 23,000*l.* and depositing 2,000l. in part of his purchase-money; many unexpected difficulties arising in the title, the deposit was laid out in the funds by the order of the Court. The Master did not make his report upon the title until the year 1784, and he then reported a good title could be made by the parties doing some particular acts, which he then pointed out, so that the title was not completed until very lately before the present time. The plaintiffs now moved that *Lord Beauchamp* might pay the residue of the purchase money in a month. There being a considerable accumulation of the dividends, which had been laid out from time to time, the question was, whether *Lord Beauchamp* was entitled to the dividend arisen upon the deposit from the year 1775, or only to interest on his deposit. And the *Lord Chancellor* thought he was not entitled to the benefit of such dividends, but only to interest upon the 2000*l.* at the rate of 4*l.* per cent. according to the common course of the Court; that if the funds had happened to have been so high that they would not have produced 4*l.* per cent. yet *Lord Beauchamp* would most unquestionably have been entitled to 4*l.* per cent. upon the principal sum deposited; or if the stocks had afterwards fallen, there was no instance of the purchaser being called upon to make good the deficiency arising from such fall. This was decisive upon the present case; for it was impossible to say, that the purchaser shall have the benefit of an eventual gain, if not subject to the eventual loss; that this came to the mere point whether the deposit was to be considerered as a mere pledge for the performance of the contract, or as part of

D'O'yley v. Countess of Powis.

the purchase money, in case nothing prevented the purchase being completed; that he always considered it as part of the purchase money; although if the purchase should by any means be overturned, the money would certainly return to the purchaser. This coincided with the opinion of *Ambrose* v. *Ambrose*, Dec. 5, 1785, which his Lordship saw no reason to vary.

This was mentioned again the last day of term, and his Lordship continued of the same opinion, and ordered Lord Beauchamp to pay the residue of his purchase money after deducting the 2000*l.* and interest at 4 per cent.—*Reg. Lib. A.* 1785, *fol.* 172.

In Court, Lord Chancellor. Feb. 11, 1786.

SHAFTO *versus* SHAFTO.

George Delaval, of Seaton Delaval, uncle of the plaintiff, being seized in fee of the manors in Thorkrington, Great Bavington, and Little Bavington, borrowed 5000*l.* of William Clayton, and by indenture of demise dated 11th March 1722 demised the manors to Clayton for 500 years, subject to redemption on payment of 5000*l.* with interest at 5*l.* per cent.

On 13th March 1723 Clayton assigned the mortgage to Francis Blake.

George Delaval, by his will dated 22d May 1723, gave the estates (subject to certain annuities) to his nephew George Shafto (eldest son of his sister) in tail male, with remainder to plaintiff, the second son in tail male, with remainder over; and he directed his nephew George Shafto to take the name of Delaval, and gave to his nephew Francis Delaval, who was his heir at law, the residue of his personal estate, after payment of his funeral expenses, a legacy of 20*l.* and his debts, not being incumbrances or any of his real estates, which his will was should be chargeable

T. was devisee of an estate which had been mortgaged to A. by the testator, which mortgage carried interest at 5*l.* per cent. S. joined in an assignment of the mortgage from A. to B. discharged from the former proviso of redemption, and subject to redemption on payment of principal and interest at the rate of 4 per cent. only, and S. covenanted for

Bagot v Bagot 34 Beav. 137

Shafto v *Shafto.*

on such estates respectively, and appointed Francis Delaval executor.

In May 1723, George Delaval died.

In Easter term 1725, George Shafto, who had taken the name of Delaval, suffered a recovery of the estates devised to him, and declared the uses to himself in fee.

payment of such principal and interest: afterwards S. agreed to raise the interest to 5 per cent. and covenanted to pay interest at that rate. Then S. died, leaving an arrear of interest due on the mortgage: this not being originally the debt of S. his covenants are only collateral and his personal estate is not primarily liable to discharge any part either of principal or interest due on the mortgage.

Francis Blake calling for his money, William Gibbons agreed to advance the money at 4 per cent. and by indenture of the 4th June 1725, between Francis Blake of the first part; George Delaval, late Shafto, then of Bavington, of the second part; and Gibbons, of the third part, reciting the mortgage and assignment, the will of George Delaval, of Scaton Delaval, and the recovery, and that thereby George Delaval, of Bavington, was become seized in fee, subject to the mortgage; Blake, in consideration of 5000*l.* paid to him by Gibbons, by direction of Delaval assigned, and Delaval confirmed, to Gibbons the mortgaged estates for the residue of the term of 500 years, discharged from the former proviso for redemption, and subject to redemption, on payment of 5000*l.* with interest at 4 per cent. and George Delaval, for himself, his heirs, executors, and administrators, covenanted with Gibbons, that he, his heirs, executors, or administrators, some or one of them, would pay to Gibbons the 5000*l.* and interest, at the time and in the manner expressed in the proviso for redemption.

In 1779 the mortgage became vested in Sir Edward E. in trust for other persons, and George Delaval gave them notice of his intention to pay off the mortgage, but finding it inconvenient so to do, he agreed to raise the interest to 5*l.* per cent. and by indenture of 2d March 1779, between Delaval, of the first part; the persons beneficially interested to the mortgage, of the 2d part; and Sir Edward E. of the third part, reciting the mortgage and assignment, and the notice, and that Delaval had proposed to increase the interest to 5*l.* per cent. in case the mortgagees would let the money remain on the security, George Delaval for himself, his executors, and administrators, covenanted with

the mortgagees, that so long as the 5000*l.* should remain unpaid the estates should remain a security for the payment of 5000*l.* with interest at 5 per cent. from the date of that deed; and that his executors and administrators would pay such interest for the same, and that the estates should not be redeemable until the 5000*l.* with interest at the rate thereby stipulated, should be paid.

In May 1782 George Delaval, of Bavington died.

By his will of the 9th December 1772, he devised the estates to a trustee for one thousand years, to secure certain annuities, and subject to that term to plaintiff for life, to the defendant for life, to his eldest son for life, remainder to first and other sons of defendant's eldest son in tail, with several remainders over; and he gave his plate and furniture to go as heir looms with the mansion house at Bavington, and four pecuniary legacies; and he gave all his personal estate not before disposed of, subject to his debts, funeral expenses, and the four last mentioned legacies, to his nephew Cuthbert Shafto, the defendant, and appointed him sole executor.

The interest on the 500*l.* mortgage was in arrear at the death of George Delaval from the 11th of March preceding, being about ten months.

The bill was brought (amongst other things) to have the 5000*l.* and interest paid out of the personal estate of George Delaval of Bavington, or at least to have the arrear of interest due at the death of George Delaval, and the additional 1*l.* per cent. charged by the deed of 1779, so paid; and if the Court should be of opinion that the Plaintiff was not entitled to have the estate exonerated out of the personal estate of George Delaval, then to have so much of the estate sold as would be sufficient to discharge the whole, but for this purpore there were not parties before the Court.

The *Lord Chancellor* was clearly of opinion, that there was no pretence for calling on the defendant Shafto, as executor of George Delaval, to discharge the mortgage debt, or any part of it, out of the personal estate. He observed, that George Delaval became entitled to the estate, subject to a charge: where a man borrows money, and

Shafto v. Shafto.

pledges land as a security for the debt, *in his hands* the land is a *collateral* security; the debt is the *principal* contract: but if the estate subject to the charge goes to another, and the personal property of the original debtor is by any means discharged from the obligation, the debt becomes only a charge on the land. The covenant of the persons becoming entitled to the estate, or his contract for additional interest, will not alter the case. In this instance the original mortgage was at 5*l.* per cent. and reduced by the person, to whose hands the whole came, to 4 per cent.; but if the interest had been 4 per cent. in the original creation of the charge, it would have been the same thing. The person becoming entitled, is entitled subject to the charge. Forbearance is necessary for him to hold the said land. The covenant to increase the interest to obtain that forbearance, does not alter the original charge on the land. The contract for additional interest turning on the same subject must be in the nature of a real charge. The interest accrued in the lifetime of the last testator, as also part of the real charge. If during the lifetime of an ancestor an arrear of interest accrued on the charge of an estate which descended to his heir, the heirs covenanting for payment of that arrear, would not alter the nature of the debt. The principle must be taken throughout. In this case the tenant for life has a right to have the charges satisfied by sale of so much as will free the rest, and he is entitled to have half the year's arrear of interest due at the death of the testator so raised as part of the charge; but as he is bound to keep down the interest of the principal debt during his life, he must pay the half year's interest which accrued after the death of the testator, out of the rents.

The remainder men after the death of Cuthbert Shafto not being before the court, and the bill appearing in other respects improper, it was proposed to set the half year's interest which accrued in the lifetime of the testator against the cost of the rest of the suit, which was consented to, and the bill was dismissed without costs against the defendant (Shafto), the plaintiff waving his claim to that arrear of interest.

EDGE *versus* WORTHINGTON.

At the Rolls. Sir Lloyd Kenyon. Feb. 15, 1786.

An agreement to mortgage with a subsequent delivery of the title deeds will amount in equity to a mortgage, and will be effectual from the time of the agreement.

The plaintiff Amelia Edge, was entitled under the will of her grandfather to a considerable legacy, and also to a share of the residue of his personal estate: of this will, William Bullock was the acting executor, and on application to him by the plaintiff for payment of what was coming to her by virtue of the will, Bullock said he had not been able to make up the accounts, but he paid her 600*l.* in part, and promised to settle the accounts soon. The plaintiff having afterwards pressed him for the remainder, Bullock did not pay it, but offered her a security for it upon a part of his real estate. Mr. Chippendall, an attorney, then attended him on the part of the plaintiff, and on the 9th of April 1782, Bullock agreed with Chippendall to give the plaintiff a mortgage for the remaider on a house in Manchester, and promised to send the title deeds to Chippendall to enable him to prepare the mortgage. On the 10th (the next day) Bullock called and left the title deeds with a clerk of Chippendall's. The mortgage was accordingly prepared, and on the 18th of the same month, was actually executed by Bullock, together with a bond for the same debt. In June 1782 a commission of bankrupt was issued against Bullock, and the defendants Worthington and Smith were chosen assignees, who possessed themselves of the house at Manchester, and were about to sell it. The plaintiff claiming to be mortgagee of this house, the defendants insisted that at the time of delivering the title deeds to Chippendall, or at least at the time of the execution of the mortgage, Bullock had committed an act of bankruptcy.

The present bill prayed a foreclosure in the usual way, but in case it should appear that Bullock had committed any act of bankruptcy prior to the execution of the mortgage, that it might be declared, that by virtue of

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the deposit of the title deeds the plaintiff was entitled to have a mortgage; and that defendants might execute a good and sufficient mortgage of the premises accordingly.

Master of the Rolls.—It is too much to say that I have no difficulty on this question. There is nothing in this cause to induce a wish on the one side or the other; but it is contended on the part of the plaintiff in support of her individual interest against the creditors at large, that she has a prior right under an agreement made at the time when the party might bind his property; and the main question in this cause is, whether this position is made out: and this is supported by plaintiff on the ground of an agreement of the 9th of April, made when the party was not insolvent. It is to be lamented perhaps that the strict line of the statute of frauds and perjuries has been ever departed from, but it is now too late to alter the decisions in that respect. People have conducted themselves on the faith of the exceptions which have been made to the statute: and amongst others, that of depositing deeds is an excepted case. The cases have decided, that the Court is to infer an agreement from the deposit of the deeds, and that the party so depositing ought to go on to execute such agreement; and that such a deposit constitutes a lien on the property. It has been supposed, that the present case falls short of the decided cases, but it seems to me to be a stronger case. The circumstance of the deeds being deposited leaves to the court to infer the agreement, or to admit parol evidence of the actual agreement. Here the parol evidence proves the actual agreement. Chippendall had from time to time applied for a mortgage. On the 9th of April his proposal was acceded to; and the creditor promised to make him a mortgage, and to send the deeds to the attorney for that purpose. When the deeds were sent, the agreement was so far performed, and they could not be obtained back, but on the payment of the money. I therefore think this is a case out of the statute, the deposit of the deeds being such a circumstance of performance of the agreement, that a court of equity must decree it to be

carried into execution; but this cause does not rest in agreement; for on the 17th and 18th of April a legal conveyance was actually executed. There is no evidence to shew that the parties then knew of the insolvency, or that there was a probability of an act of bankruptcy having been *then* committed. His affairs were apparently in confusion, the accounts not made up, but there does not seem any idea of his insolvency. This cause is brought to the simple case of a bill of foreclosure, and I must treat this mortgage as a valid security.

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His Honour first pronounced the common decree, that the Master should take an account of principal and interest, &c. but afterwards in order to avoid the effect at law of an act of bankruptcy between the 9th of April and the date of the mortgage, his Honour added a declaration, that the transaction of the 9th of April amounted to a valid agreement to execute a mortgage.—*Reg. Lib. A.* 1785, *fol.* 212.

BARING *versus* DIX.

At the Rolls. Sir Lloyd Kenyon. Feb. 17, 1786.

On a bill filed by two partners against the third, praying an account of all partnership dealings, and that the partnership might be dissolved, and the leasehold premises, on which the trade had been carried on, might be sold, it appeared that the partnership had been originally instituted for the purpose of spinning cotton under a patent which had been obtained in that behalf, but that after several attempts, the invention totally failed, and was now entirely given up. The defendant Dix refused to consent to the dissolution of the partnership, or the sale of the leasehold premises, notwithstanding it appeared that the mills must otherwise remain wholly unoccupied, and the rent be payable without any profit arising to answer it. And the counsel for the plaintiffs apprehended that they could not

The court will dissolve a partnership where it appears that the business cannot be carried on according to the true intent and meaning of the articles of co-partnership, although one partner objects to the dissolution.

Jennings v Baddeley 3 Ves 81.
Harrison v Tennant 21 Beav. 482.
Astle v Wright 23 Beav. 78.
Re Lib. Hotel Co. 2 L. Rep. Ch. 743
Wilson v Church 13 Ch. D. 29

Baring v. *Dix.*

insist upon the dissolution of the partnership, or the sale of the premises, against the consent of the defendant; but his Honour ordered, "that upon the defendant's refusing to concur in the sale of the premises, and the dissolution of the co-partnership, it should be referred to the Master to inquire and state to the court, whether the said co-partnership business could now be carried on according to the true intent and meaning of the said articles of co-partnership." And his Honour declared that if the Master should report, that it could *not* be so so carried on, he would direct the premises to be sold, and would dissolve the co-partnership.—*Reg. Lib. A.* 1785, *fol.* 393.

N. B. On the 30th of May following, the defendant Dix signified his consent to the dissolution.

In Linc. Inn Hall, Lord Chancellor. Feb. 24, 1786.

PERCHARD *versus* BENYON.

On a question between the real and personal representatives of A. (who died intestate), whether A. had actually agreed in his lifetime for the purchase of an estate, the parol declarations of A. in his lifetime are not admissible evidence.

Bill was filed by plaintiff as heir at law of one Perchard, who died intestate, against the personal representatives of Perchard and several other parties, to compel a specific performance of an agreement alledged in the bill to have been entered into by Perchard in his lifetime, for the purchase of some freehold premises at Homerton. The defendants, the vendors, were willing to carry the agreement into execution, and the only question was between the plaintiff as heir, and the defendants, the personal representatives of Perchard, whether there was sufficient in the circumstances of this case to establish an agreement completed in Perchard's lifetime, so that the heir could compel the personal representatives to perform it out of the personal assets.

Scott, for the plaintiff, first attempted so establish it as a written agreement, by letters which passed in the intestate's lifetime, but they not amounting to any positive

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agreement, he next insisted upon it as a parol agreement in part performed, and mentioned some acts of the intestate's for that purpose. He cited *Lacon* v. *Mertions*, 3 *Atk.* 1, as a point to the present.

The *Lord Chancellor* said, he allowed that case to be very good law, there being very strong circumstances of part performance; but in the present case he did not think the circumstances amounted to more than the acts of a man, who thought himself sure of having the agreement executed at a future time.

Scott then offered to read evidence of Perchard's declarations of his being owner of the premises, or of his having concluded the agreement for them, and contended that it was now the clear law of the court, that a defendant is in conscience bound to answer as to the fact of a parol agreement having been made or not; but when by the death of the party that discovery cannot be had immediately from himself, evidence of this declaration ought to be admitted.

But the *Lord Chancellor* held this evidence inadmissible, and dismissed plaintiff's bill without costs.

RUSSELL *versus* SMYTHIES.

At Serjeants Inn Hall. Lord Chief Baron Skyner, Barons Eyre, Hotham. Feb. 28, 1786.

On the 26th of September 1746, by settlement previous to the marriage of John Blanchett and Dorothy Smythies, reciting the intended marriage, that Dorothy was entitled to 1000*l.* and that in consideration thereof Blanchett had agreed that 500*l.* part of the 1000*l.* should be secured and assigned to the sole and separate use and appointment of Dorothy free from the controul of Blanchett, and that the same should remain and be disposed of laid out and settled in the manner, and for the uses, intents, and purposes after mentioned; in consideration of the marriage, and for settling and securing the fortune of Dorothy to her

By marriage settlement 500*l.* was assigned to trustees in trust, to lay the same out in land, with the consent of the wife, and to pay the rents to the wife for her life, for her separate use, remainder to

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separate use as aforesaid, and for making such provision concerning the same as after expressed, and in pursuance of the agreement aforesaid, Dorothy, with the consent of Blanchett, assigned to Moses Griffiths and William Smythies the sum of 500l. and all her interest, &c. upon trust for Dorothy, her executors, administrators, and assigns, until the marriage, and after the marriage upon trust, with all convenient speed, *with the consent* of the said Dorothy testified in writing, under her hand and seal in presence of two witnesses, to lay out and dispose thereof, or any part thereof, in the purchase of lands of inheritance in fee simple, to be conveyed to Griffiths and Smythies and their heirs in trust, to pay the rents to Dorothy for her life for her separate use, and from and after her decease, in trust for the said John Blanchett and his assigns for his life, and from and after the decease of Dorothy and Blanchett and the survivor in trust, that the said Moses Griffiths and William Smythies and their heirs should forthwith convey the same to such person or persons, and for such estate or estates, and subject to such provisos, conditions, and limitations, and in such manner as Dorothy by any deed or writing under her hand and seal, or by her last will and testament in writing, attested *by three or more credible witnesses*, should from time to time direct and appoint, and for want of such direction or appointment then in trust for the right heirs of the said Dorothy Smythies for ever. Provided nevertheless, and it was declared and agreed that in the meantime, and until such purchase or purchases should be made as aforesaid, the trustees, with the consent of Dorothy, testified by writing under her hand, in the presence of two witnesses, should lay out the 500*l.* and every or any part thereof at interest on securities, or in purchase of stock, and that the interest or dividends of such securities or purchases should from time to time be paid to the said Dorothy and her assigns during her life to her separate use in like manner as before declared, and from and after her decease *unto such person or persons*, and to and for such uses, intents, and purposes, as the rents,

the husband for life, and after the death of the survivor in trust, to convey the same to such persons, and for such estates as the wife should by deed or will appoint; and in default of appointment, in trust for the right heirs of the wife for ever. Proviso that until such purchase should be made the trustees should invest the money in the public funds, with the consent of the wife, and pay the dividends to the wife for life, for her separate use, and after her death to such persons as the rents of the lands to be purchased would go to, according to the limitations aforesaid, and to pay or transfer the principal sum of 500*l.* or the stock in

issues and profits of the said lands, tenements, and hereditaments so agreed to be purchased, as aforesaid, would go and belong according to the limitations aforesaid, in case such purchase or purchases and settlements were so made and perfected, and the said principal sum of 500*l.* should likewise be paid to, or the securities, or stocks, or funds, in which the same may then happen to be invested, should be assigned and transferred to such person or persons as according to the limitations aforesaid might be entitled to the fee simple and inheritance of the said messuages, lands, tenements, and hereditaments, in case such purchase and settlement as aforesaid had been actually made.

which the same should be invested to such person as, according to the limitations aforesaid, would be entitled to the inheritance of such lands. This 500*l.* was never paid to the trustees, but remained in the hands of the husband at the death of the wife. She having made no appointment, this 500*l.* vested in her heir at law (subject to the life interest of the husband) but the heir took it as *money*, and therefore at her death this interest passed to his personal representatives.

In the settlement was also contained a covenant by Blanchett, that in case Dorothy should die in his lifetime leaving no issue of the marriage, then the executors, &c. of Blanchett should within twelve months after his decease pay to such person or persons as Dorothy should by any writing under her hand, signed in the presence of two or more credible witnesses nominate and appoint, or in default thereof unto her executors and administrators, the sum of 500*l.*

There was no issue of the marriage. The sum of 500*l.* was not laid out in lands according to the settlement, or paid to the trustees, but the whole fortune of Dorothy, except a moiety of 250*l.* due on a mortgage, was received by Blanchett her husband.

Dorothy died in July 1751, leaving a paper writing or testament, without date or signature or attestation, but all of her own hand writing, by which, after taking notice that she had a power, by marriage contract, to dispose of 500*l.* she gave several legacies after the death of her husband to the amount of 460*l.*

Blanchett after her death proved this instrument in the Prerogative Court of Canterbury, and obtained administration with the writing annexed.

John Blanchett died 26th November 1780. The plaintiffs were his executors, and brought their bill to obtain payment of the moiety of 250*l.* due on the mortgage

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to the estate of Dorothy, and to have the rights of the parties claiming the 500*l.* and 500*l.* settled.

The first 500*l.* which was agreed to be laid out in lands was claimed by the personal representatives of Palmer Smythies, the eldest brother and heir of Dorothy at her death; and by William Carlton Smythies the heir at law of Palmer; and by the representatives of William Smythies, the nephew of Dorothy, and her right heir at the death of John Blanchett her husband; and also by the next of kin of Dorothy.

The second 500*l.* which was covenanted to be paid by Blanchett, was claimed by the plaintiff his executor as undisposed of, contending that the writing in the nature of a will of Dorothy, was intended to apply to the first 500*l.* or was not a good appointment of the second 500*l.* Blanchett had in his own will taken notice that the sum of 450*l.* was owing to the Smythies family, and directed his executors to pay the same, and it appeared that this direction could only have reference to 450*l.* part of the 460*l.* mentioned in his wife's appointment, and given to the Smythies family, they having no other claim upon him.

The Court was of opinion that the first 500*l.* belonged to the personal representatives of Palmer Smythies, the heir of Dorothy at her death; and that 460*l.* part of the second 500*l.* must be paid according to Dorothy's appointment. The *Lord Chief Baron* and Baron *Eyre* said, as to the first 500*l.* that although money covenanted to be laid out in land was to be considered as such in equity, as in the case of *Lechmere* v. *Lechmere*, because intended at all events to be laid out in land, yet it was otherwise in this case. It was not intended at all events to be laid out in land, for Dorothy's consent was necessary, and it was to be paid and transferred as money, if not laid out in land. Therefore it was a vested interest in Palmer Smythies, the person first entitled on the death of Dorothy, and was a vested interest in him as money.

As to the second 500*l.* the *Lord Chief Baron* thought the writing left by Dorothy not a good execution of the

power, but confirmed by the acts of the husband, and particularly his will. Baron *Eyre* thought the covenant authorised a testamentary appointment by the engagement to pay to her executors or administrators, *id est*, to her will or administration with will annexed, and is confirmed by the acts of the husband.

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Baron *Hotham* considered the settlement as giving an election to Dorothy as to the first 500*l*. If she chose it, it was to be laid out in lands, if not, it was to continue money.

STOKES *versus* MOORE AND UXOR.

In Serjeants Inn Hall. Lord Chief Baron Skyner, Barons Eyre, Hotham, Perryn. March 1, 1786.

This was a bill for the specific performance of an agreement. It stated, that by indenture of lease of the 15th of June 1767, Nicholas Leach demised the premises in question to John Stokes, for sixteen years, at the yearly rent of 24*l*.; that by the death of Nicholas Leach the premises became the property of the defendants, subject to the said lease, and the said lease having, by the death of Stokes, rested in plaintiff his widow, she died in the year 1783, and previously to the expiration thereof, applied to the defendants for a renewal thereof, and to have the premises repaired; that upon a survey thereof the defendants declared the repairs would amount to more than they expected, being 57*l*. in the whole, and therefore they would not renew the lease unless the plaintiff, in addition to the former terms, would pay the king's tax, in which case the defendants would execute a new lease and do the necessary repairs, and to these terms, after some consideration, the plaintiff agreed; that plaintiff afterwards acquainted defendant Moore with her acceptance of the terms, and desired to know by what person the lease should be prepared, whereupon the defendant named Mr. Sewer, an attorney, and wrote certain instructions from whence the same was to be prepared in the words following; "The lease renewed, Mrs. Stokes to pay the

The mere circumstance of the name of the party being written by himself in the body of a memorandum of agreement for a lease will not constitute a signature within the meaning of the statute of frauds. Parol evidence is admissible to explain the terms of an ambiguous written agreement, but not to extend it.

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king's tax, also to pay Moore 24*l.* a year, half-yearly. Mrs. Stokes to keep the house in good tenantable repair, and to paint the whole outside and wash-house of the house twice in oil in May 1787, the second painting in like manner in May 1792, under penalty of 100*l.* sterling: lease paid for by Stokes." That a lease was prepared from Moore and his wife to Stokes for sixteen years, at 24*l.* with a covenant on the part of Moore and his wife, that Moore should immediately lay out 57*l.* in substantially repairing the said premises, but that upon tender of this lease to Moore for execution, he refused to execute the same, and the bill therefore prayed a specific performance, &c. To this bill the defendants pleaded the statute of frauds in the usual way, with an averment "that the agreement in the bill suggested to have been made, or any other agreement to any such or the like effect, was not, nor was any memorandum or note in writing signed by the defendants, or either of them, nor by any other person by the defendants, or either of them lawfully authorized.

Upon arguing this plea, it was ordered to stand for an answer, with liberty to except, whereupon the defendants, by their answer, admitted the written instructions, but denied the lease in bill mentioned to have been drawn in pursuance of such instructions, particularly in respect of the 57*l.* to be laid out in repairs, which are not mentioned in the instructions, without answering the fact of the parol agreement.

The cause coming on now to be heard, *Burton* and *Johnson*, on the part of the plaintiff, offered to read evidence of declarations of defendant Moore, "that if plaintiff would pay the king's tax, in addition to her old rent, she should have a lease of the premises."

Selwyn and *Bicknall*, for defendant, objected to reading this evidence, as being merely intended to supply a written agreement by parol, which is not to be allowed, *Binsted* v. *Coleman*, *Bunb.* 65. In the case of *Whitchurch* v. *Bevis*, (*a*)

(*a*) This case was so determined on the first argument, but on a re-argument his Lordship was of opinion that on the special circumstances of that case the plea of the statute of frauds should be allowed.

although the *Lord Chancellor* determined that a plaintiff was entitled to the benefit of the defendant's answer to the fact of the parol agreement (which benefit the plaintiff has missed in this case, by not excepting to the second answer of the defendants) yet his Lordship expressly held that a plaintiff could not prove a parol agreement *aliunde:* and in this case there is no ambiguity on the face of the instructions, which will serve to admit this evidence (even if the instructions themselves amount to an agreement) but it is to prove an addition to this agreement.

For plaintiff.—We argue that these instructions amount to a written agreement, and produce this evidence in explanation of it; but if this is to be considered as an additional agreement, it is not within the statute. The additional part is not an agreement relative to any interest in lands, but merely to do some repairs to a house, of which therefore parol evidence may be given.

The Court was of opinion that this was an attempt to alter an agreement by parol evidence, and therefore contrary to the established law of the courts. Parol evidence is certainly admissible in explanation, but this was clearly going much farther; and as to calling it a separate agreement, if it be so, the plaintiff has nothing to do with it, for then it is only the defendant's undertaking to repair his own house, and their Lordships were therefore of opinion that the evidence was inadmissible.

It was then insisted on the part of the plaintiff, that this was a good written agreement, and signed by the party, inasmuch as the same was all in defendant's own hand writing, and his name was in the body of the instrument, which was equivalent to its being signed at the bottom, *Welford* v. *Beasely*, 3 *Atk.* 503. And it was likened to cases upon wills, in which it had been determined that the testator writing his name in the introduction to the will, was a good signing within the statute. And 2dly, it was said that this memorandum was sufficiently certain in its terms for the court to carry it into execution, for as it is purported to be a renewal of the old lease, it was to be intended

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to be upon the same terms as to all particulars not expressly mentioned, and therefore, by reference to the old lease, sufficiently certain.

On the other side *Hawkins* v. *Holmes*, 1 *Wms.* 1770, was chiefly relied on to shew the necessity of signing by the party, and as to the certainty of the instructions, the plaintiff shewed by her own case, that they were not very precise, having offered evidence in explanation.

Lord Chief Baron.—The question in this case is, whether the written note stated in the pleadings is such an agreement as is within the meaning of the statute of frauds. These are instructions to the attorney for the preparation of the lease. This is no formal signature of the defendant's name, but one term of the instructions is, that the rent is to be paid to *Moore*; and the question is, whether the name so inserted and written by the defendant is a sufficient signing. The purport of the statute is manifest, to avoid all parol agreements, and that none should have effect, but those signed in the manner therein specified. It is argued that the name being inserted in any part of the writing is a sufficient signature. The meaning of the statute is, that it should amount to an *acknowledgment by the party* that it is his agreement, and if the name does not give such authenticity to the instrument, it does not amount to what the statute requires. Here the insertion of the name has not this effect. This memorandum might be drawn subject to additions or alterations, and does not appear to be the final agreement of the parties, and indeed as far as we can admit parol evidence, it is proved not to be so, for the subject of repairs is not mentioned in the instructions; which shews that the ends of the statute are not to be obtained, if so informal a paper is to be admitted as a written agreement. No case has been adduced in point, but it has been compared to the case of wills, where a name written in the introduction has been considered as a signature, but that seems to me a very different case. The cases on wills have been where the instrument, importing to be the final instrument of the party, has been

formally attested, and it is in its nature complete, and the only question has been, whether the form of the statute has been complied with. In the present case I think it is by no means so, and it would be of very dangerous tendency to admit the memorandum to be an agreement within the statute.

Mr. Baron *Eyre*.—If it were necessary to decide the point on the signature, as far as my opinion is made up on the question, I think this cannot be considered such a signature as the statute requires. The signature is to have the effect of giving authenticity to the whole instrument, and if the name is inserted *so as to have that effect*, I do not think it signifies much, in what part of the instrument it is to be found: it is perhaps difficult, except in the case of a letter with a postscript, to find an instance where a name inserted in the middle of a writing can well have that effect; and there the name being generally found in a particular place by the common usage of mankind, it may very probably have the effect of a legal signature, and extend to the whole; but I do not understand how a name inserted in the body of an instrument, and *applicable to particular purposes*, can amount to such an authentication as is required by the statute; but I think this question not so material, for on the more substantial merits of the cause, this memorandum does not appear to be the final agreement of the parties. It seems rather subsequent to an agreement to which it refers, and of which it appears to be a part execution. It does not appear what such agreement was; the facts of the case prove that these instructions were not a memorandum of what the agreement really was, for it is admitted that some part of the agreement was not contained in them; and this was a very important part of it. Besides all this great uncertainty, it is giving too much force to words to construe the expression of renewing the lease, as an agreement for another lease *totidem verbis*, and yet unless the expression is to have this effect, there is no definitive length of time mentioned for which the lease is to be granted. This uncertainty is open to great inconvenience, and is what the statute particularly meant to

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obviate. Therefore on the substantial merits of the case, as not having the true agreement before us on paper, I think this bill must be dismissed; but I am also of opinion that this is *not a signature of the paper.*

Hotham and *Perryn* concurred.

Bill dismissed *without costs.*

In Linc. Inn-Hall, Lord Chancellor. Jan. 17, 1785, *and March* 9, 1786.

HOARE *versus* PARKER.

A. being entitled under a will to the use of certain articles of plate for her life, pawned them with B. who kept an open pawnbroker's shop. Bill was filed by the representatives of the testator, after the death of A. against B. for a discovery of the particular articles pawned, in order to enable the plaintiffs to proceed in an action at law, for the recovery of them. To this discovery the defendant pleaded that certain articles of plate were deposited with him, for cer-

The bill stated that James Steuart by his will, dated the 1st December 1752, gave and bequeathed to Robert Long, Henry Rowe, and Robert Greenway, their heirs, executors, and administrators, all his estate both real and personal, upon the trusts thereinafter mentioned, and particularly the said testator gave and bequeathed to his wife Mary Steuart for and during her life (in case she should so long live sole and unmarried, but not otherwise) the use and usage of such and so much of his plate as the said Mary Steuart should think fit to chuse and be desirous to have the use of: and the said testator thereby directed his said trustees to cause an inventory or schedule to be made of the several particulars whereof his said wife should make choice, and that under such schedule or inventory they should take her acknowledgement in writing, signed by her own hand of the receipt thereof, and of her having the same in her custody to the end that they might be enabled in case of her death or marriage to recover the said plate. And the testator then proceeded to dispose of the rest of his real and personal estate for the benefit of his and his issue in manner therein mentioned and appointed said Robert Long, Henry Rowe, and Robert Greenway executors; that after the death of the testator, his widow Mary Steuart made choice of some of the plate, and subscribed a receipt for the same; that Mary Steuart died on the 14th December 1782, by which her interest in the said

plate ceased; but that the said Mary Stewart in her lifetime pawned the whole or the greater part of the said plate to the defendant for some considerable sums of money: that plaintiffs (who were the assignees in trust of the representative of the surviving trustee and executor under the will of the said testator) had commenced an action at law against the defendant for the recovery of the said plate; but that they could not proceed therein for want of a discovery of what articles of plate were pawned to the said defendant, and the bill therefore prayed that the said defendant might set forth and discover a full and particular account of all and every, of the several pieces and parcels of plate, belonging to the said testator, so pawned or pledged, or pretended to be pawned or pledged, by the said Mary Stewart, or by any person or persons by her order or for her use, with him the said defendant; together with the several days and times when the same was or were so respectively pawned or pledged, or pretended to be pawned or pledged, and the respective sum and sums of money lent and advanced on each particular article, with true copies of all entries in his books of account, papers, or memorandums, originals or duplicates of such pawns or pledges, or in any wise relating thereto, in order to enable plaintiff to proceed to trial in the said action, to recover back from the said defendant, the said plate, so pawned or pledged, or pretended to be pawned or pledged as aforesaid.

PLEA.—To so much of the bill as seeks any discovery from defendant of the pieces or parcels of plate, which were pawned or pledged to defendant by Mary Steuart, or by her order or for her use, as thereinafter mentioned, and whether such pieces or parcels of plate or any of them were the property of the testator James Steuart and were bequeathed by his will, or that seeks that defendant shall set forth an account of all, or any, or either of the pieces or parcels of plate, so pawned or pledged, or that seeks any discovery from defendant, whether all, or any, or either of the pieces or parcels of plate, contained in the schedule to the complainant's bill, came to the hands or

tain sums of money *bonâ fide* lent and advanced thereon to A.; but he did not by his plea (*though he did by his answer*) aver that he had no other articles of plate in his possession. For this defect in point of form the plea was overruled. The defendant then insisted on the same point by his answer in bar to the discovery, but the court thought that where a plea to a bill of discovery was overruled, the defendant could never insist on the same thing by answer.

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possession of defendant, by pledge or pawn, from the said Mary Steuart, or any person by her order, or for her use; or that seeks a discovery from defendant, for what particular sum of money each article of the said plate, pledged or pawned by the said Mary Steuart with defendant, was so pledged or pawned, or that seeks that defendant shall discover or set forth any account of all, or any, or either of the pieces or parcels of plate belonging to the said testator, which were pledged or pawned with defendant by the said Mary Steuart, or by her order, or for her use, and the copies of all entries, &c. Defendant doth plead in bar, and for plea saith that on the 6th day of April and 31st day of August 1781, &c. during all which time defendant carried on the business of a pawn broker, the said Mary Steuart being possessed of certain pieces of plate, and claiming the same as, and alleging the same to be, her own absolute property, and the same so appearing to defendant, the defendant did *bonâ fide* advance and lend to the said Mary Steuart or for her use, several sums of money (to the amount therein mentioned), all which sums of money were really and *bonâ fide* advanced and paid by defendant to said Mary Steuart, on the said days accordingly; and the said Mary Steuart by herself or her agent at the same times respectively, deposited and pledged the said pieces and parcels of plate respectively with defendant, as a security for the said sums of money respectively. Defendant then averred that the said money was never repaid, &c. and that he did not at any or either of the respective days, when the pieces or parcels of plate, which were pledged or pawned by the said Mary Steuart with him as aforesaid, were so pledged or pawned, or at any time before the death of the said Mary Steuart, know nor had any notice or information or suspicion of the will of the said testator, &c. &c.

Defendant then by *answer* denied notice, and said that the said Mary Steuart or any person on her behalf never pledged or pawned with defendant any plate whatever, except the pieces mentioned in the plea; and he had

not, nor ever had, had in his possession or power, any other plate whatsoever in which the said Mary Steuart had any interest.

In support of this plea *Hollist* insisted that the defendant being a purchaser for a valuable consideration, without notice, was not bound to assist plaintiff by a discovery; and cited *Snelling* v. *Squibb*, 2 *Cha. Ca.* 47. *Perrat* v. *Ballard*, 2 *Cha. Ca.* 72. *Abery* v. *Williams*, 1 *Vern.* 27.

Madocks and *Stainsby* for plaintiff, insisted that the rule of this Court which says that purchasers without notice, and for valuable consideration, shall not be bound to discover, applies only to a discovery of their title, and not of the particular things inquired after being in their possession, which last is the object of the present bill: and *Stainsby* mentioned the case of *Hartop* v. *Hoare*, 3 *Atks.* 44. to shew how Courts of law considered cases of this kind. It was also insisted that this plea mentioning only some specific articles of plate which were pawned, and not averring that no other articles of plate were pawned (although that was done by answer) did not meet the point made by the bill, as it did not appear that the specific articles mentioned by the plea were the same as those inquired after by the bill.

The Lord Chancellor said, that he could not see any room to make a distinction between the cases of a discovery being sought for the title of the purchaser, and a discovery of the specific things in his possession; but the same rule must apply to both, namely, that a purchaser without notice and for a valuable consideration, is not bound in conscience to assist the right owner in the legal recovery of the subjects, purchased under such circumstances; he therefore thought *that* was no objection to the present plea. But the other objection, that it was not averred by the *plea* that no other articles (except those specified) had been pawned to the defendant, seemed to him to be a good objection; and it was not sufficient to aver that by an answer, which would be in fact making the answer supply the defects of the plea, instead of support-

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ing it. The plea ought to have gone on to aver, that defendant had no articles in his possession but those specified before; for otherwise it is saying, that defendant having lent money on *certain* articles, shall be a reason why he shall make no discovery as to any others. Upon this objection therefore the plea must be overruled.

The plea having been overruled upon this ground, defendant now put in a further answer, whereby he answered some few further facts; but instead of answering the several circumstances intended to be covered in his former plea, he insisted upon the same matter by his answer in bar to such discovery. Exceptions being taken to this answer, the Master allowed them and reported the answer insufficient, to which report the defendant excepted, which exceptions came on to be argued in *Lincoln's Inn Hall*, before the *Lord Chancellor*, on the 9th of March 1786.

Scott and *Hollist* for defendant.

As to the merits of the case, the defendant having *bonâ fide* advanced money upon the pledge of the plate in question, without notice of want of title in the pawner, shall not be obliged in a court of equity to furnish any assistance by way of discovery to a plaintiff, to enable him to take away the pawn from the pawnee. It is analogous to the case of a bill for discovery of goods bought of a bankrupt subsequent to his act of bankruptcy. There the bankrupt has nothing more in him than a title arising from possession; for from the time of the act of bankruptcy, the property is out of the bankrupt. So here the pawnee had a complete title to possession.

The *Lord Chancellor* asked whether there were any instances, after a plea overruled, of the same thing being allowed to be insisted upon by answer; and to shew that it might be done, *Scott* cited *Harris* v. *Ingledew*, 3 *Wms.* 94, 95. *Finch* v. *Finch*, 2 *Ves.* 492. but his Lordship said, those were cases of bills of relief; but he knew no instance of the same being done in bills of discovery only.

It was then prayed for the defendant, that he might amend his plea, so as to bring the matter fairly upon the merits.

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But the *Lord Chancellor* said, he did not think it a sort of case to induce him to go at all out of the common way in favor of the defendant. It is not to be compared to the case of bankruptcy, for there the court would probably go as far as it could to relieve a party surprized by a dormant act of bankruptcy; but it is against good policy to give any encouragement to a pawn-broker taking such articles as plate, without any inquiry as to the title of the pawner.

The defendant must answer.

ATHERTON *versus* NOWELL.

In Linc. Inn Hall. Lord Chancellor. Mar. 16, 1786.

COPY OF ORDER.

Thursday the 17th of March 1786. Between John Atherton and Robert Moss, esq. Plaintiffs.

And Henry Constantine Nowell esq. (late Jennings) and Elizabeth Catherine his wife, and Dorothy Ann Nowell spinster, and Wilbraham Bootle, esq. Defendants.

Order upon an application of a wife under special circumstances, to be allowed maintenance for herself and child, out of a fund standing in the name of the Accountant General, to which the husband became entitled in right of his wife during the coverture, the husband opposing the application.

"Whereas the defendant Henry Constantine Nowell did on the 9th March instant prefer his petition to the *Lord High Chancellor*, setting forth that Alexander Nowell esquire, the testator in this cause, by his will dated 25th July 1771 gave and devised all his messuages, lands, tenements, and hereditaments whatsoever, unto William Halton, since deceased, and the plaintiffs, and their heirs upon trust to raise so much money as would with his personal estate, discharge all his just debts, and all costs and charges attending the execution of that trust; and gave to Charlotte Nowell then his wife an annuity of 200*l.* and subject thereto, he gave and devised all the said premises to his first and other sons respectively in tail general, with remainder to his daughter the late defendant, Elizabeth Eleonora Nowell, her heirs and assigns for ever; but if she should

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die under 21 years of age, then to his said wife Charlotte Nowell for her life, with remainder to his niece the defendant Elizabeth Catherine Nowell (late Jennings) for her life; with remainder to trustees to preserve contingent remainders; with remainders to the first and other son of the said Elizabeth Catherine Jennings in tail male with other remainders over, and appointed the first William Halton, and the plaintiffs executors thereof: And that the said testator by a codicil to his said will, in case he should have no child besides his said daughter Elizabeth Eleonora Nowell, gave to his said wife so long as she continued unmarried an additional annuity of 100*l.* she maintaining and educating his said daughter, till she should attain 21 years, and declared that the provision made by the will and codicil, was for her dower: That the said testator died in May 1773, and left the defendant Charlotte Nowell his widow and the said Elizabeth Eleonora Nowell, his only child and heiress at law: That the plaintiffs and William Halton duly proved the said will, soon after which the said William Halton died: that by the decree made in this cause, dated the 12th day of December 1775, it was declared that the said will and codicil was well proved: and it was decreed that the same should be established, and the trusts thereof performed and carried into execution; and it was ordered that it should be referred to Mr. Harris, to take an account of the testator's real and personal estates, not specifically bequeathed, come to the hands of the plaintiffs; and that the said testator's estate should be sold, and the clear residue of the money arising by the sale, and the surplus of the rents (if any) after the payments thereby directed, should be paid into the Bank, and laid out in the purchase of Bank 3 per cent. annuities, in the name of the Accountant General, in trust in the cause upon the trusts, and subject to the contingencies in the said testator's will mentioned: that the said testator's estates were on the 27th February 1777 sold for the sum of 28,100*l.* and the purchaser paid in 22,100*l.* part of his purchase money, subject to a mortgage for 6000*l.* (the defendant R. W. Bootle, the mortgagee, consenting to let it

remain on the said estate): that on the 4th Jan. 1778 the defendant Eliz. Eleonora Nowell died an infant, without having been married, and intestate; and thereupon her mother, the said Charlotte Nowell, took out administration to her: that the plaintiff in Hilary Term 1778 exhibited their bill of revivor and supplement against the said Charlotte Nowell and the said Henry Constantine Jennings and Elizabeth Catharine his wife, and Dorothy Ann Nowell; and the said cause was heard on the 17th of July 1778, when it was ordered that the former decree should be carried into execution, and that the account thereby directed should be prosecuted and carried on by the present parties to that suit in like manner as thereby directed against the then parties: that *Wm. Ord*, Esq. the Master, who succeeded *Mr. Harris*, made his report in the cause, dated the 8th July 1779, and after certifying that he had taken the several accounts directed by the decree, certified that upon the death of the said Elizabeth Eleonora Nowell, the infant, on the 4th of Jan. 1778, the said Charlotte Nowell her mother became entitled during her life to the interest of the clear residue of the said testator's real and personal estates by virtue of his said will and codicil; that the said Charlotte Nowell has received the interest of 13,085*l.* 13*s.* bank annuities, purchased with the clear surplus of the money arising by the sale of the said testator's estates, after paying the several debts and incumbrances affecting the same, up to the 5th day of July 1785, and she died on or about the 8th November last: That the defendant Henry Constantine Nowell, in right of his wife, the first defendant Elizabeth Catherine Nowell, upon the death of the said Charlotte Nowell, is entitled to receive the interest of the said 13,085*l.* 13*s.* 3 per cent. bank annuities during the life of his said wife; and therefore praying that the Accountant-General might be directed to pay the interest of the said 13,085*l.* 13*s.* 3 per cent. annuities to the said defendant Henry Constantine Nowell, during the joint lives of the said petitioner H. C. Nowell, and the said Elizabeth Catherine Nowell his wife: Whereupon all parties con-

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cerned were ordered to attend his Lordship on the matter of the said petition this day. And whereas the said Elizabeth Catherine Nowell, by Colonel Charles Heathcote, her next friend, did on the 10th of March instant also prefer her petition to his Lordship, setting forth that the said petitioner being about seventeen years of age in 1777, then intermarried with the said H. Constantine Nowell, who previous thereto made a settlement on her for life, in case of her surviving him, and then to commence, of an estate in the island of Jamaica, in which estate the petitioner is informed the said H. C. Nowell has only an estate for life; that the said petitioner, in expectation of her said husband being a man of fortune, as fallaciously stated by the said settlement, consented to the said marriage: that the said H. Constantine Nowell (then Jennings) so far from being in good circumstances, was at the time of his said marriage with the petitioner greatly involved in debt, which a few months after such marriage occasioned his being arrested and thrown into the King's Bench prison, where he remained till liberated by the rioters in 1780: that the said petitioner during this period constantly resided with her said husband, and endured many hardships from such disappointment: that in 1782 the said H. C. Nowell was again arrested for debt, and thrown into Chelmsford gaol, where he has ever since continued and still remains: that the said petitioner has had three children by her said husband, two of whom are dead, and one now survives, to support whom and herself, she has been put to extreme difficulties: that the said petitioner has implored her said husband to allot some fixed provision for her and her child, which he has constantly refused, and required her to cohabit with him in the said prison of Chelmsford, or to be at his mercy for such occasional support as he may think proper to bestow on her: that from his behaviour to her, as well as on account of her own health, she is afraid of living with him in the said gaol: that under the will of Alexander Nowell, Esq. deceased, the petitioner is become entitled for life to the

dividends of 13,085*l.* 13*s.* 3 per cent. bank annuities, standing in the name of the Accountant-General of this court, on the credit of this cause, which have arisen since the 5th July last, and the interest to arise thereon: that the petitioner and her infant child being now pennyless, crave the protection of the Court, submitting that under the special circumstances of the case some fixed permanent allowance might be made for their support out of the dividends arisen and to arise from the said 3 per cent. bank annuities; and therefore praying that the Accountant-General might be directed out of the 198*l.* 5*s.* 8*d.* constituting the dividend due on the 5th January last, to pay to Col. Charles Heathcote, for the present support of her and her infant child, the sum of 150*l.* and that it might be referred to *Mr. Ord* to inquire and certify under the said special circumstances what would be fit and proper to be allowed and paid to the said Col. Charles Heathcote for the future maintenance and support of the said petitioner and her infant child until the further order of the Court. Whereupon all parties were ordered to attend his Lordship on the matter of the said petition this day, and counsel for the petitioners in both the said petitions, and the annuitants this day attending accordingly: upon hearing of the said petition of the said defendant Henry Constantine Howell, and the petition of the defendant Elizabeth Catherine his wife, an affidavit of the defendant Elizabeth Catherine Howell, and the Accountant-General's certificate read, and what was alledged by the counsel for the said parties, his Lordship doth order that the sum of 50*l.* part of the sum of 198*l.* 5*s.* 8*d.* cash in the bank in this cause, be paid to the petitioner the defendant Elizabeth Catherine Nowell for her separate use, and for payment thereof the Accountant-General is to draw, &c. &c. And it is ordered that it be referred to *Mr. Ord* to inquire into circumstances and situation of the family of the said defendants Henry Constantine Nowell, and Elizabeth Catherine his wife, and in what manner, according to the circumstances and situation they may be in, the growing produce of the 13,085*l.* 13*s.*

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bank 3 per cent. annuities, standing in the Accountant-General's name, in trust, in this cause, ought to be settled; and it being suggested that the defendant Henry Constantine Nowell on his marriage with the said petitioner Elizabeth Catherine his wife, was seized of, or entitled to, an estate in the island of Jamaica, it is ordered that the said Master do inquire into the value of the said estate, and what is the defendant H. C. Nowell's interest therein, and the said Master is to state the result of the above inquiries and all circumstances to the Court, and thereupon such further order shall be made as shall be just."

The cases cited were *Bond* v. *Simmonds*, 3 *Atk.* 20. *Williams* v. *Callow*, 2 *Vern.* 752. *Oxenden* v. *Oxenden*, 2 *Vern.* 493. *Newsome* v. *Bowyer*, 3 *P. W.* 37. *Sleech* v. *Thorington*, 2 *Vez.* 560, and the cases of *Colmer* v. *Colmer*, and *Watkyns* v. *Watkyns*, there cited.

In Linc. Inn-Hall, Master of the Rolls, for the Lord Chancellor. April 26, 1786.

STAMP *versus* COOKE.

ON FURTHER DIRECTIONS.

Testator directed the residue of his estate to be parted to his "his next relations as sisters, nephews, and nieces." Testator left his three sisters A. B. and C. and D. the only child of a deceased sister, and L. the only child of a deceased brother, his next of kin;

James Stamp, by will dated 20th of January 1780, appointed John Cripps and Benjamin Stephenson to be joint trustees and executors of that his will, and directed that his executors should lay out in the funds, within twelve months after his decease, 1000*l.* in trust, in the names of *the* two nephews, George Stamp Baker, and the plaintiff James Stamp, with liberty for them to sell the same at their age of twenty-three years, share and share alike; but if either should die under twenty-three years, then the living party should have the whole; but if both should die "then the thousand pounds should come to his (said testator's) sisters, if living, or to his nephews and nieces of his sisters." He then directed his executors to lay out in the funds the sum of 500*l.* for the benefit of Elizabeth Watson, as therein mentioned, and to be transferred to her at her age

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of twenty-one years; but if she should die under twenty-one years, "then the said legacy to become void, and to be given to his nephews and nieces, as aforesaid, of his sisters, share and share alike, as the legacies by him to his nephews Stamp and Baker;" and after giving several other legacies, he directed his executors to turn all the residue of his real and personal estate into money, and buy good funds with the same, his wife to receive the interest of the same during her life, and after her death "his executors were to make every thing into money, and part the same to his *next relations*, as sisters, nephews, and nieces."

but at the time of his death his sister A. had two children living. The residue must go according to the statute of distributions.

The testator at his death left three sisters, Sarah Cook, Mary Pierson, and Lucy Proben, and plaintiff James Stamp (the only child of John Stamp, the testator's brother deceased), and George Stamp Baker (only child of Ann Baker, another sister) his next of kin, and also two children of Sarah Cooke, who had another child born two days after the testator's death.

The principal question was, who should be entitled to the residue of the testator's estate "*as his next relations*," &c. whether the next of kin only, or all his sisters and nephews and nieces, *per capita*, his wife being now dead.

On the original hearing of the cause in Hilary Term, 1782, it was agreed on all hands, that by the expression of "nephews and nieces of his sisters," in the earlier part of the will, the testator meant *his own* nephews and nieces by his sisters, but the question arose on the words of the residuary clause. The *Lord Chancellor* then directed an account of the personal estate, &c. and the Master was to inquire who were the testator's next of kin at the time of his death, and what sisters, nephews, and nieces the testator had living at his death, and at the death of his wife, and what nephews and nieces had been born since: and the Master having reported to the effect above mentioned, the cause now came on for further directions.

Mansfield and *Stratford* for the children of Sarah Cooke, insisted, that although the rule of the Court was, that where the words "relations" or "next relations," were made use

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of without other words to explain the intent of the testator, the next of kin should take, yet that rule was only adopted where the testator had left his meaning doubtful, and in order to prevent the conclusion arising from every possible relation having a claim; but that in this case the testator had explained whom he meant to be his "*next relations*," by going on to say "*as* sisters, nephews, and nieces," which amounted to the same thing as if he had given the residue amongst his sisters, nephews, and nieces, in which case they would have taken *per capita*, and the children would have taken although their mothers were alive; and therefore the children of Sarah Cooke were entitled to come in equally with their mother, and Mary Pierson, Lucy Proben, the plaintiff James Stamp, and George Smith Baker.

Master of the Rolls.—It has been properly argued that the statute of distributions is not to be reverted to in cases of this kind, where the testator has himself laid down another rule; but has that been done in the present case? If the residue has been given to the "next of kin," and the testator had stopped there, the statute would certainly have been the rule to go by; and although nephews and nieces are not in fact so near as sisters, yet the fund would have been distributable *per stirpes*, according to the statute. Now in the present case I cannot say it is sufficiently clear to me that the testator did not mean this very thing: he gives the residue to "his next relations, as sisters, nephews, and nieces;" he does not enumerate them, or direct them to take share and share alike; he means to part it amongst them in the same manner as the statute does; he could not tell whether his sisters might not die in his lifetime, and then if a sister died, the children were to stand in her place: and this construction is reconcilable with the words he makes use of; there is not therefore in this case sufficient to warrant me in departing from the common rule, and I shall direct the residue to be divided in fifths amongst the next of kin, viz. James Stamp, George Stamp Baker, Sarah Cooke, Mary Pierson, and Lucy Proben.—*Reg. Lib. B.* 1781, *fol.* 218, and 1785. *fol.* 331.

In Court. Master of the Rolls, for Lord Chancellor. May 9, 1786.

EARL *of* TANKERVILLE *versus* FAWCETT.

An estate descended from A. to B. subject to a mortgage. A. died considerably indebted by simple contract. B. made a further mortgage of the premises for payment of the simple contract debts of A. This is not a debt which the personal estate of B. is *primarily* liable, but both the mortgages are charges in the *first instance*, on the land.

Christopher Fawcett, seized of divers copyhold premises in the county of Durham, mortgaged some part thereof to Thomas Hogg, for securing the repayment of the sum of 400*l* and other parts to Grace Andrew for securing the repayment of 500*l*. and upon the death of Christopher Fawcett intestate (which happened in the year 1757), these copyhold premises descended, subject to the said mortgages, on his sister and heir at law *Joan*, wife of John Colville.

On 17th February 1758, John Colville and Joan his wife, surrendered the said copyhold premises to the use of a trustee in trust, for such uses, intents, estates, and purposes as the said Joan, notwithstanding her coverture, should direct, limit, and appoint, and in default thereof in trust for Joan Colville, her heirs, sequels, and assigns for ever.

There being considerable arrears of interest due on the said mortgages, and Christopher Fawcett having left several debts at his death which John and Joan Colville were desirous of discharging by money to be raised by future mortgage of these copyhold premises, they joined in borrowing a sum of money of John Andrew, to be secured by mortgage of the said premises, which together with the two mortgages made by Christopher Fawcett, and which had since vested in the said John Andrew, as assignee of the said Thomas Hogg, and as executor of Grace Andrew, amounted in the whole to 2650*l*.; and accordingly on the 5th of December 1758, John Colville and Joan his wife, and the trustee joined in a surrender of these premises to the use and behoof of John Andrew and his sequels in right, with a defeazance declaring the said surrenders to be made upon such uses, trusts, intents, and purposes, as were declared by an indenture bearing even date therewith; by which inden-

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ture the said surrenders were declared to be made in the first place for the better securing to the said John Andrew payment of the said sum of 2650*l.* and interest, and subject thereto in trust for the said John Colville and Joan his wife and their assigns for their lives, and after their decease then in trust for the heirs, sequels in right, and assigns of the said John Colville, for ever.

It appeared that the whole of this money was applied in payment of the principal and interest due on the mortgages made by Christopher Fawcett in his lifetime, and in payment of his other debts, and that no part thereof ever came to John Colville, and that John Colville entered into no bond or covenants for the payment of it. This bill was filed by the heirs at law of John Colville, praying that his personal estate might be applied in discharge of this mortgage.

The first point was, whether the personal estate (in general) of John Colville should be liable to be applied in discharge of this mortgage, or any part of it, as between his real and personal representatives. As far as the two mortgages made by Fawcett in his lifetime and the interest thereon, it was admitted, that the plaintiff's claim could not be supported, the case of *Evelyn* v. *Evelyn* having expressly decided this; but with regard to the remaining 1750*l.* *Mansfield*, for the plaintiff, insisted that this was a sum of money borrowed by Colville, and therefore within the common rule with respect to the application of the personal estate in case of the real; and as to its being borrowed for the purpose of paying some debts of Christopher Fawcett, that could make no difference, because those were not debts which before affected the copyhold estate.

On the other side it was insisted by *Scott* and *Mitford*, that since it was perfectly clear, that no part of this money ever came to the hands of Colville, and as he had entered into no bond or covenant for the payment of it, had received no benefit whatever from it, nor had indicated any intention of making it a debt on his personal estate, the copy-

hold premises must bear the burthen. *Lewis* v. *Nangle*, 1752.

The second point was this; it was insisted by the defendants that John Colville left no personal estate, except a leasehold estate, holden under the Dean and Chapter of Durham, and which he had specifically bequeathed by will, and therefore if the first point should be against the defendants, yet it was clear that the rule of applying the personal estate, could never apply so as to defeat specific legacies.

For the plaintiff, it was said this was not a specific bequest, for although it certainly was particularly mentioned in the will, yet it was only enumerated with other articles in the residuary clause, whereby all the residue was given to the wife, who was the sole executrix; and therefore this was to be considered as given as part of the residue, and not in the nature of a specific legacy.

Master of the Rolls.—Upon the principles which are to decide this case there can be doubt. It is quite immaterial, whether Mr. Colville had given any bond, or had covenanted to pay the money or not. It is clear on the one hand, that when the land comes to the hands of a person encumbered, that person's personal property will not be primarily liable, notwithstanding he may have joined in subsequent assignments, and covenanted for the further security of the money; and so on the other hand (generally speaking) whenever the personal estate has been benefited by the money secured, that shall be the fund first liable, though there be no covenant or bond. In this case the parties who enjoyed Mr. Fawcett's property felt a very honourable desire to discharge his debts, and the whole money raised was so applied. Therefore upon the general principle of the cases, as between the real and personal representatives of Mr. Colville, I am of opinion, the personal estate is not to be applied in aid of the real; and on the other point I am clearly of opinion, that this leasehold estate is specifically bequeathed, and therefore not to be broken in upon for the discharge of this mortgage.

Rule dismissed.

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LEWIS AND NANGLE.

7th Nov. 1752, before LORD CHANCELLOR, cited in the preceding Case.

Mrs. Nangle was, before her marriage with defendant, indebted to sundry persons, and entitled to the inheritance of lands charged with the payment of sundry sums, and before her marriage with the defendant entered into articles, whereby the premises were to be settled upon the husband for life, *sans* waste, remainder in like manner to the wife for life, remainder to the issue of the marriage, remainder to the wife in fee. The marriage took effect, and the husband being pressed for payment of the wife's debts, and having also occasion for a further sum of money, they join in a mortgage of the wife's estate, and make a settlement thereof subject to such mortgage, whereby the husband's power of committing waste is taken away, and the wife has also a power of appointing the fee notwithstanding the coverture, and in other respects the former uses continued. The wife in her life time, made an appointment of the fee to her sister, and died *sans* issue; the plaintiff was devisee of the mortgage, and brought this bill for payment of the mortgage money, and the question was whether, in respect of those claiming under the wife, the husband should be considered as debtor for the money, as he had covenanted for payment of the money.

These cases were cited against the husband: *Earl of Huntingdon* v. *Countess of Huntingdon*. *Baggot* v. *Houghton*, 1 *W.* 347.

Lord Chancellor.—Regularly where the wife joins with the husband in mortgaging her estate, and the husband covenants for payment of the money, this Court looks upon the husband as debtor, and it is presumed, that the wife meant only by joining in the security to make the creditor safe. Otherwise it is where the mortgage *is made at the same time as the settlement*, and the husband covenanted for payment for the satisfaction of the creditors; *for it is then presumed the whole was but one transaction, and the estate should be*

charged, and especially if done to pay any *of the wife's debts or charges* upon her estate; and though *more money* was raised than sufficient for that purpose, as the transaction was single, he must suppose the parties had an uniform intention; and in the present case it appeared, that it was intended that the wife's estate should be charged, and it was held that the husband should only keep down the interest for life.

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CARY *versus* ASKEW.

In Court. Master of the Rolls for Lord Chancellor. May 9, 1786.

Robert Cary by a will made in the year 1773 devised all his freehold and copyhold estates, in default of issue male, to Mrs. Askew and Mary Cary, his two daughters, and all other daughters that he might thereafter have, as tenants in common fee; after which he had another daughter the plaintiff Lucy Cary.

In 1777 the testator gave instruction to Mr. Woodcock for a second will, the draft of which was prepared accordingly, and read over to and approved of by the testator, and was taken by Mr. Woodcock to order to have a fair copy made for the testator's signing; but before the same was completed the testator died. This however was proved after his death in the ecclesiastical court, as a testamentary paper, and it appeared, that the testator had thereby devised all his freehold and copyhold estates between his two daughters Mrs. Askew and Mary Cary only; and to the plaintiff Lucy he bequeathed the sum of 15,000*l.* to be paid to her upon her attainment of the age of 21 years or marriage, which should first happen, with interest for the same in the mean time; but if she should die before 21 or marriage, then he willed the said 15,000*l.* should not be raised, but should sink into the residue of his personal estate; and he also gave directions, that out of the interest of the

C. by his will devised all his freehold and copyhold estates to his two daughters A. & M. and all other daughters, that he might thereafter have, as tenants in common in fee. He had afterwards another daughter L. He then gave directions for another will, by which he gave all his real estates to his two eldest daughters, and a sum of 15,000*l.* to his daughter L. The Attorney took the minutes of this 2d will in writing;

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said 15,000*l.* there should be yearly expended for the maintenance of the plaintiff, the sum of 100*l.* until she was 8 years old, 200*l.* from thence to 14, and 300*l.* from thence to 21 years of age or marriage.

There were three points made in this cause.

1st, Whether this second will was sufficient to pass the copyhold estates (for the freehold of course could not pass by it.)

2d, Whether the plaintiff should be at liberty to claim the 15,000*l.* under the second will, and at the same time the real estate in opposition to it, or should not be put to her election.

3d, Whether plaintiff should be entitled to have the whole interest of 15,000*l.* or only such sums are specified by the will, to be applied for her maintenance.

Mansfield, *Madocks*, and *Mitford* for plaintiff.

This second will is not such an instrument as will pass the copyhold premises. It has been long settled that the statute of frauds, as far as it respects devises, does not apply to copyholds; but yet it seems, that there must be some writing signed at least by the party, in order to pass them. It is rather difficult to know in what right a will disposing of copyhold premises, is to be considered. The lands are said to pass by the surrender, and therefore the will seems to be more analogous to a declaration of trust, than any thing else. Now the statute says a declaration in trust, must be by some writing signed by the party, or by his last will in writing. Now here is no will or writing, that is, no will written by the testator, for the instructions taken by the person, who was to prepare the will, are merely minutes of the parol declarations of the testator. *Wagstaff* v. *Wagstaff*, *2 Wms.* 258, though not directly to this point, seems to consider a will devising copyholds as a declaration of trust.

2d, The plaintiff is not bound to make any election, but may claim her share of the copyhold under the first will and her legacy of 15,000*l.* under the second. This is expressly determined in *Hearle* v. *Greenback*, *3 Atk.* 715. for the will unattested is so completely void as to the real

but before it was prepared the testator died. These minutes were proved in the spiritual court as a testamentary paper:

1st, this paper being proved in the spiritual court is sufficient to pass the copyhold estate;

2d, but is so totally void as to the freehold, that it will not put L. to her election under which will she take, and she therefore will take her share of the freeholds, under the first will, as well as the 15,000*l.* under the second.

3d, the testator gave the 15,000*l.* to his daughter L. to be paid her at 21 or marriage, without interest for the same in the mean time; but if she died before 21 or marriage, then the 15,000*l.* was not to be raised, but was to sink into the residue of his personal estate,

estate, that it cannot be read to raise the implied condition arising from the disposal of them. It is to all intents as if no such disposal had been made of the real estates, and the personal legacy had been merely given. So *Boughton* v. *Boughton*, 2 *Ves.* 12, admits this law; but makes the distinction between the express and implied condition.

3d, Plaintiff is entitled to the interest of the 15,000*l.* from the death of the testator; this being the case of a legacy from a parent to a child, she would have been entitled to interest, if it had rested on the mere bequest of the 15,000*l.*; but here it is expressly given "with interest in the mean time;" but it is contended on the other side, that the clause which says, "that if plaintiff shall die under 21 and before marriage, then the 15,000*l.* shall not be raised," will make the difference; but this clause applies only to the principal, and leaves the interest as before, which is therefore to accumulate for the benefit of plaintiff beyond the maintenance specified in the will.

Attorney-General and *Scott* for defendants.

On the 1st point his Honour said they need not trouble themselves.

2d, The distinction in *Boughton* v. *Boughton* is, that the will not duly executed, cannot be read to shew a devise of real property; but it may to shew the condition annexed to a personal legacy. Now this seems to amount to the same thing, as if the condition can be implied from any other part of the will, which does not directly import a devise of lands. In this case sufficient may be collected from this will to raise the implication, &c.

3d, It must be admitted that if the bequest of the 15,000*l.* had stood strongly, it must have carried interest to the plaintiff, in the shape of maintenance from the death of the father; but here being an express maintenance provided by the will, it seems a fair inference that no more was meant to be raised, or at least that the plaintiff shall not have it until 21 or marriage, when the principal is payable.

Master of the Rolls.—As to the interest on the legacy of the 15,000*l.* it is the invariable law of the Court, that

and he directed that out of the interest of the 15,000*l.* certain sums of money should be applied for the maintenance of L. The interest of this legacy beyond the maintenance is vested in L. and must accumulate for her benefit.

Cary v. Askew.

where a legacy is given by a parent to a child otherwise unprovided for, the child shall have the interest on the whole sum by way of maintenance from the death of the parent. In this case interest is expressly given, and there is nothing which follows this gift in my mind sufficient to controul it: and plaintiff must therefore have interest at *4l.* per cent. from testator's death: and I shall order it to be raised and brought into court immediately, according to the case of *Green* v. *Pigot*, *Bro. Cha. Rep.* 103.

Then as to the copyhold passing, I have long considered it as an established rule, that any will which has been proved in the spiritual court, is sufficient to pass copyhold lands, which have been surrendered to the use of the will, or trusts of copyhold which need no surrender. Whether this was a wise determination at first, is another question; but it is now too late for me to raise the doubt. Even if it be an error, it is too inveterate to be now shaken. I am therefore of opinion, that this will, though not signed by the party, yet being received by the spiritual court, is sufficient to pass the copyhold premises.

As to the question of the election, the cases which have been cited are certainly great authorities; but I must confess I should have great difficulty in making the same distinctions, if they had come before me. They have aid, you shall not look into a will unattested, so as to raise the condition which would be implied from the devise, if it had appeared; but if you give a legacy on condition that the legatee shall himself give the lands, then he must elect: however I am bound by the force of these authorities, to take no notice whatever of the unattested will as far as it relates to the freehold estates, and therefore the plaintiff cannot be put to her election.

In Court. Master of the Rolls for Lord Chancellor. May 16, 1786.

WEBB *versus* JONES.

Henry Wyatt by his will devised all that his mansion house, in which he then dwelt and all the buildings and appurtenances thereto belonging, and all his farms and lands in the county of Gloucester, to certain trustees therein named, to hold the same to them, the said trustees, their heirs, and assigns, upon trust that they should sell the same and should apply and dispose of the money arising by such sale in manner following; (that is to say,) in the first place in payment of all charges that should be thereon at the time of his death, and also all other his just debts, bond and simple contract, legacies and funeral expenses, and from and after payment thereof, then as for and concerning the residue of such purchase money, that the same should be paid and applied in the manner following: (viz.) as to one moiety thereof to his daughter Mary Wyatt, her executors, administrators, and assigns: and as to the other moiety in trust, to lay out the same in government securities, and to apply the dividends to the maintenance and education of Henry, Francis, and Michael, the three sons of his daughter Ann Jones, until they should attain their respective ages of 24 years, and when they respectively should have attained that age, he gave the said moiety equally to be divided amongst them; and in case any of them should die under 24 years of age, then to the survivors or survivor of them; and in case all of them should die before their ages of 24 years, then he directed that *such moiety should sink into and be deemed part of the residue of his personal estate*, and be paid and applied in such manner as his personal estate was thereinafter given and disposed of. He then gave several specific legacies, and all the rest and residue of his personal estate of what nature or kind soever, his household goods, plate, linen, china, jewels, and other valuables not before disposed of, he gave

W. by his will devised his real estate to trustees in trust to sell and to apply the purchase money in the first place in payment of all the charges, and all other his debts and legacies, and as to the residue of the purchase-money, to pay one moiety to his daughter M. and to lay out the other moiety in Government securities, and to pay the dividends for the maintenance of the three sons of his daughter A. until they should attain their respective ages of 24 years, and when they should have attained that age, he gave that moiety equally to be divided amongst them; but if they all should die under 24, then he

Webb v. *Jones.*

directed that such moiety *should sink into and be deemed part of the residue of his personal estate,* and be applied in such manner as his personal estate was thereinafter given and disposed of. He then gave several specific legacies; and all the residue of his personal estate he gave to his daughter A. and to H. equally to be divided between them. The debts and legacies are payable in the first instance out of the purchase money of the real estate.

to his said daughter and William Hill, equally to be divided between them.

The question was whether there was sufficient in this will to make the real estate liable to pay the debts and legacies in the first instance, or only in aid of the personal estate; and in order to shew that it requires either express words of *exemption* or a necessary implication, to change the usual order of applying the funds, and to make the real estate primarily liable, were cited *French* v. *Chichester*, 2 *Vern.* 568. *Haslewood and Pope*, 3 *Wms.* 322. *Samwell* v. *Wake*, 1 *Bro. Cha. Rep.* 144. *Duke of Ancaster* v. *Mayer*, 1 *Bro. Cha. Rep.* 454.

Master of the Rolls.—The general rules upon this subject are perfectly well established. The personal estate is the primary fund for payment of debts, and cannot be exonerated from the claims of creditors, unless some other fund be substituted, which is sufficient for that purpose. The clear intention, to be collected from the context, is to govern. Now here I think there is amply sufficient to shew the personal estate was not to be applied. I do not lay much stress upon the direction to pay the debts out of the real estate; but what I principally rely upon, is the direction that the *residue* of the purchase money is to be added *to* his *other personal* estate: now this is incompatible with the idea that the personal estate should be applied in the first instance; and I am therefore of opinion, that the purchase money of the real estate is applicable in exoneration of the personal estate. And his Honour declared the same accordingly.—*Reg. Lib. B.* 1785. *fol.* 361.

At the Rolls. Sir Lloyd Kenyon. May 16, 1786.

MILBOURNE *versus* MILBOURNE.

Clayton Milbourne being seized of freehold and copyhold estates in the counties of Huntington and Cambridge, by his will of the 11th of May 1753, devised all his messuages, farms, lands, tenements, and hereditaments with the appurtenances in the counties of Huntingdon and Cambridge to his wife for life, and after her decease to his eldest son Clayton Milbourne in tail, remainder to his 2d son in tail, remainder to the wife in fee; having at the beginning of his will declared, that as to *all* the worldly estate with which it had pleased God to bless him, he disposed thereof as followed.

Testator seized of freehold and copyhold estates in the counties of H. and C. devises all his lands, tenements, and messuages and hereditamens in those counties, to his wife for life, remainder to his 1st and 2d sons in tail, remainder to his wife in fee, having in the beginning of the will, declared that as to *all* his worldly *estate* he disposed thereof as therein followed, but not having surrendered the copyhold to the use of his will. The Court will not supply the want of a surrender, there being freehold estates to answer the words of the devise.

The question was, whether as the testator had not surrendered his copyhold estates to the use of his will, they would pass under the general devise of his messuages, farms, lands, &c. and whether the Court would supply the want of the surrender in favour of the wife.

Scott and *Stanley* for plaintiff.

Madocks and *Lloyd* for defendant.

Master of the Rolls.—The general rule is, that wherever it is apparent that the party means to include copyhold premises in a devise in favour of creditors or wife or children, the Court will supply a want of a surrender to the use of the will. The only question therefore is, whether the party here meant to comprehend the copyhold premises, under the general terms he has made use of. In all cases (especially relating to real property) it is very fit to abide by the rules already laid down, which are properly called the land-marks of property, although I must admit I think some of the cases have been carried too far. As to *Drake* v. *Robinson*, 1 *Wms.* 444, I cannot understand Lord *Macclesfield*'s distinction between the sons and the creditors. However I am glad to find other cases which will guide me in this. In *Ross* v. *Ross*, 1 *Eq. Cases Ab.* 124. it is settled that where there are freehold

Milbourne v. Milbourne.

lands to satisfy the words of the will, the copyhold will not pass. To the same effect is *Haslewood* v. *Pope*, 3 *Wms.* 322. copyholds not being in their nature objects of testamentary disposition, shall not be supposed within the intention of the testator, unless he has shewn such intention by surrendering them to the use of his will; or in case the words of the will cannot be satisfied otherwise; and then in favour of creditors, wife or children, the court will become auxiliary to the imperfect disposition. I do not rest much on the particular according of the will, although it certainly appears to be drawn by a skilful person, and therefore the technical words made use of, which apply peculiarly to freehold lands, have some weight. However I proceed principally on the authorities decided by Lord *Talbot* (*Harris* v. *Ingledew*, 3 *Wms.* 96. *Haslewood* v. *Pope*, 3 *Wms.* 322.) and *Sir Joseph Jekyl*, (both men of consummate knowledge,) and as there are in this case freehold lands to answer the words of the devise, I think the defect of the surrender ought not to be supplied as to the copyhold.

FREEMANTLE *versus* FREEMANTLE.

At the Rolls. Sir L. Kenyon. May 23, 1786.

BY CONSENT.

An immediate devise to great grand-children will not include a great grand-child in *ventre sa mere* at the testator's death.

John Edwards esquire by a codicil to his will bequeathed to his great grand-children, the children of his grand-daughter Frances Freemantle, 6000*l.* Old South Sea annuities, to be transferred to trustees in trust for his said great grand-children, and the interest or dividends thereof in the mean time to his said grand-daughter Frances for their support and education, and on each attaining the age of 21 years, to pay her or him the share then due, and so in proportion to the survivors as they became 21 years of age in full, and the remainder to the last survivor. At the death of the testator the grand-daughter

Freemantle v. Freemantle.

Frances had five children living, and was pregnant of a daughter, born within two months after the testator's death. She had also another child, who died in the testator's life time, and another born some time after his death, but before the eldest son attained twenty-one.

For the last child it was argued, that the legacies did not vest at the death of the testator, but at the time of the distribution, which was at the time when the eldest attained twenty-one, and any child living at that time would be entitled. For the child *en ventre sa mere* it was more strongly urged, as several cases have considered such a child as in *esse*.

But his Honor declared, that the 6000*l.* Old South Sea annuities belonged to the plaintiffs the *five* great grandchildren of the testator, *who were born and in esse at the time of the said testator's death:* and his Honour said, that he had decided the point as to the child *en ventre sa mere* in the same manner very lately,—*Reg. Lib. A.* 1785, *fol.* 530.

HODGES *versus* SALOMONS.

In Court. Master of the Rolls for Lord Chancellor. May 24, 1786.

ON EXCEPTIONS.

Where an exception is taken to a master's report including several distinct matters, and the report appears right in any one instance the exception must be over-ruled.

The plaintiff having taken sixty-one exceptions to the defendant's answer, the Master allowed them: the defendant took one general exception to the Master's report, that he ought not to have allowed the said exceptions. Most of the exceptions depended upon one question, which would determine, whether the defendant ought to have answered or not; but in arguing the exceptions to the report, it appeared, that in the first matter excepted to the answer was insufficient, and his Honor was of opinion, that the exception to the report being general, if the answer appeared insufficient in any one particular, the exception must be over-ruled, and therefore did not go on to hear the other matters argued.

In Court. Master of the Rolls, for the Lord Chancellor, June 1786.

LUGAR *versus* HARMAN.

A bequest of a residue to be divided equally "amongst all the children of my late cousin E. L. and my cousin P. F. and their lawful representatives," is a bequest to the children of E. L. and to P. F. himself, and not to the children of P. F.

The testator in this cause bequeathed the residue of his personal estate to one Harman for life, and after his death to be divided equally amongst "all and every the child and children of my late cousin Edward Lugar, *and my cousin* Philip Fearis and their lawful representatives."

When this cause came on his Honour was of opinion that on the construction of this will the residue belonged to the plaintiffs (the four children of Edward Lugar) and to *Philip Fearis himself*, in equal shares, and that the construction could not be to give the residue to the children of Edward Lugar and *to the children of* Philip Fearis; for in that case you must at least understand the word "of" (*viz.* the children of my late cousin Edward Lugar and *of* my cousin Philip Fearis), whereas the words as they stand have a plain grammatical sense, *viz.* to the children of Edward Lugar and to Philip Fearis himself. And his Honour therefore dismissed the bill as against the children of Fearis, who were made defendants, and directed the account, and that the interest should be paid to Harman for life, with liberty after his death for any persons interested to apply.

After the death of Harman the plaintiffs applied, and by order of November 1788, four-fifths of the funds were ordered to be carried to the accounts of the four plaintiffs, the children of Lugar, and the remaining one-fifth to be paid and transferred to Philip Fearis.

In Court. Master of the Rolls, for Lord Chancellor. June 26, 1786.

STEBBING *versus* WALKEY.

A. by will gave to the *two* daughters

Mary Stebbing by her will of 23d April 1785 gave unto the *two* daughters of Mr. Titus Stebbing the sum of 10*l.* each.

Stebbing v. *Walkey.*

Margaret Harriot Stebbing by her will of 31st of December 1785, gave a sum of 182*l.* short annuities to trustees on trust, as to 100*l.* part thereof, to apply the same in manner therein mentioned; and as to the remaining annuity of 82*l.* "on trust to pay the same unto and between the *two daughters* of Mr. Titus Stebbing in equal shares and proportions during so much of the term to come therein as they should live, and if either of them should die before the expiration of the said term, then in trust to pay the whole to the survivor of them; but if *both* should die before that time, then the same was to fall into the residue of the said testatrix's personal estate."

It appeared that at the time of making both these wills, Mr. Titus Stebbing had *three* daughters, and this raised the question in the cause, what should be the effect of the bequests in these two wills in favour of the "*two* daughters of Mr. Titus Stebbing," there being no proof whatever in the cause.

Scott and *Mitford*, for the plaintiffs, who were the two eldest daughters of Mr. Stebbing, argued that in cases of this nature the Court has always shewn an anxiety to prevent the bequest being void for uncertainty; and if they would not presume the testatrix to mean the two eldest daughters, who were more likely to be known to and in the contemplation of her, then all the three should take; which is authorized by the cases of *Sleech* v. *Thorrington*, 2 *Ves.* 564, and *Scott* v. *Fenhoulett*, (*a*) before Lord *Thurlow*, which cases decide the present question.

Madocks, for the youngest daughter, relied on the same cases.

Pryce, for the residuary legatee.—It is clear in both the wills the testatrixes had only two persons in contemplation as the objects of their bounty. In the first only the sums of 10*l.* are given from the residuary legatee, and in the latter the annuity is to fall into the residue after the death of two persons; yet by the construction contended for on the other side, three legacies of 10*l.* each will be given by the

of S. the sum 10*l.* each. B. by will give 82*l.* short annuities, in in trust, to pay the same to and between the *two* daughters of S. in equal shares and proportions; and if either of them should die before the expiration of the term for which the annuities were to run, then to pay the whole to the survivor; but if both should die before that time, then the same was to fall into the residue of the personal estate. At the times when both these wills were made, S. had *three* daughters. Under the first will the three daughters shall take 10*l.* each, and under the second the *three* shall take the short annuities *equally*, with survivorship amongst them *all.*

(*a*) Ante, p. 79.

In Court. Master of the Rolls, for Lord Chancellor. July 4, 1786.

WILLIAMS *versus* BISHOP OF LANDAFF.

Testator by will limited his estate in Essex to several persons in succession in manner therein mentioned. He then devised his estate in Suffolk to trustees in trust to sell, and out of the purchase money to pay all his debts, legacies, and funeral expenses; but in case the Suffolk estate should happen to be deficient for those purposes, then the deficiency should be made good out of the Essex estate. He then gave several specific and pecuniary legacies, and gave all his personal estate not therein before disposed of to his wife S. After making this will the testator sold the Suffolk estate and received the purchase money. The debts, legacies, and funeral expenses were paid out of the purchase money. The wife S. died. Held, that the Essex estate was liable to make good the deficiency of the Suffolk estate.

John Luther Esq. being seized of some real estates of considerable value, and particularly of one estate in the county of Suffolk, and another in the county of Essex, made his will, and thereby in the first place, very cautiously limited his estate in Essex to trustees in trust for divers persons therein named, with directions that they should take the name of Luther on coming into possession of the estate. He then proceeded to devise his Suffolk estate to trustees in trust, as soon as conveniently might be after his decease to sell the same; and he directed that the said trustees should stand possessed of the money to arise by such sale, in trust thereout to pay and *discharge* the *debts* which he the said testator should owe at the time of his decease, *and his funeral expenses*, and *the several expenses* therein after expressed, and in trust within one year after the decease to set apart and appropriate the sum of 4000*l.* for the several purposes therein after mentioned. Then followed a proviso "that in case the said premises which he the said testator had therein before made subject to the payment of his funeral expenses, debts, and legacies *should happen to be deficient for those purposes*, then and in that case such deficiency should be supplied and made good by and out of the *premises in the county of Essex*, and he directed that his said trustees should supply and make good the same thereout accordingly." The testator then gave several specific and pecuniary legacies, and then bequeathed "all his ready money, securities for money, stocks, and money in the public funds, and all other his personal estate of what nature or kind soever, not therein before disposed of to Sarah Williams, her executors, administrators, and assigns."

After making this will the testator *sold* the Suffolk estate absolutely, and received the purchase money, which gave rise to one of the questions in the cause as to the effect of the provisions made by the testator for payment of his funeral expenses, debts, and legacies.

Williams v. B. of Landaff.

Another question arose on the circumstance of the testator after making his will, having purchased a leasehold estate in Essex, called Priors, which was assigned to him by indenture of 5th Nov. 1777 by Lucy Billinghurst for the remainder of a term of 999 *years*. It appeared that by an indenture inrolled in his Majesty's Court of Common Pleas, and bearing date the 31st day of December in the 34th year of Elizabeth, and made between Gabriel Colford of one part, and William Finch (under whom the said Lucy Billinghurst by mesne assignments claimed this leasehold property) of the other part, it was witnessed that in consideration of a sum of 210*l.* the said Gabriel Colford did covenant with the said William Finch, that he the said Gabriel Colford and Thomasine his wife would levy a fine of the said premises (which was afterwards levied) to the use of the said William Finch, his executors, administrators, and assigns, for the term of 999 years, and of the reversion of the said premises to be to the use of the said Gabriel Colford, his heirs, and assigns for ever, with a proviso as follows: "Provided always that if the said William Finch or any of his heirs shall at any time hereafter by any deed indented express his mind and will to be to have the freehold and inheritance of the said premises, or any other use or uses of the same, or for any other estate, that then and from thenceforth the said fine and other assurance shall be, and be adjudged and taken to be to the only use and behoof of such person and persons, and for such estate and estates, use and uses, and in such sort, manner, and form as in and by such deed indented, shall be expressed and limited." And in the said indenture was a covenant by Gabriel Colford for such further assurance of the said premises in manner and form aforesaid, as the said William Finch, his executors and administrators should require, whether it should be by fine, feoffment, recovery, with double or single vouchers over, deed or deeds inrolled, or any other mode.

The first question in this case was, whether there was sufficient in this will to exempt the personal estate as between the devisees of the real estates, and the residuary legatee of the personalty; and the several cases on this

gacies, and funeral expenses, shall be raised out of the Essex estate in exoneration of the personal estate.

A fine was levied of certain premises by a man and his wife to the use of B. his executors, &c. for 999 years, and at the same time the lessor covenanted that if B. his heirs, or assigns shall by deed express his will and mind to have the freehold and inheritance of the said premises, then such fine should enure to such persons, and for such estates as by such deed should be expressed.

This lease is a mere chattel, and will pass by a general residuary bequest of personal estate.

Williams v. *B. of Landaff.*

subject were alluded to, and particularly *Duke of Ancaster* v. *Mayer*, *Bro. Cha. Rep.* to shew that personal estate will not be exempted from the incumbrances to which it is naturally subject, but by express words or necessary implication, neither of which (as was contended) was to be met with in the present will.

But in the next place it was argued, that although the personal estate would be exempt, if the question stood upon the words of the will, yet the subsequent act of the testator himself, namely, his selling the Suffolk estate, would alter the case; that it never was the intention of the testator to make his estate primarily liable to the payment of his funeral expenses, debts, and legacies, but was only to be applicable in case the Suffolk estate should be deficient, which of course implied that the Suffolk estate was to be first applied; that in fact the testator's personal estate had received the benefit of the sale of the Suffolk estate, and therefore the personal estate to *that extent* at least was applicable before the Essex estate could be resorted to, which seemed to be a great object of the testator's attention, and which he had shewn great anxiety to preserve in his name and family. To these arguments were objected the express words of the will, substituting the real estates as the funds for payment of the debts, funeral expenses, and legacies, and the clear intention to give the personal estate discharged from those incumbrances.

The next question was, whether these leasehold premises, holden under the particular circumstances, and attended by this remarkable covenant as to the freehold and inheritance (which was said to have the effect of making the owner of the leasehold premises a *cestui que trust* of the freehold) should be considered as mere personal estate, or at least such as would pass under a general residuary bequest of personal estate made before these premises were purchased by the testator.

Master of the Rolls.—The great question in this cause is, whether this testator's personal estate is to be exempt from the payment of his funeral expenses, debts, and legacies in favour of Mrs. Williams, the residuary legatee. The rules of the Court in cases of this nature are too well

established to admit of a doubt. A testator cannot *exempt* his personal estate from a creditor, unless *by substituting another fund* for payment of the debt sufficient for that purpose; but whether he means so to do and exempt the personal estate by those means, need not to be expressed in any particular form; but it is to be collected from the whole will taken together. Upon the present will it seems to me impossible to doubt but that the testator did intend to exempt his personal estate. He devises his Suffolk estate to be sold, and expressly directs his trustees to pay the funeral expenses, debts, and legacies, and then provides for any possible deficiency out of the Essex estate, and gives the residue of his personal estate not therein before disposed of to Mrs. Williams. But then another question is made, whether an event which has happened since, will not alter the case, that is the sale of the Suffolk estate. This argument that the Essex estate is not applicable until the Suffolk estate, or its value, should have first been applied, would lead to monstrous consequences; for in case the personal estate should prove insufficient, it would defeat the good and honest intention of a testator to subject his real estate to payment of all his debts, and would in spite of such intention, make him (as it is called) sin in the grave. It would require a strong case to support such a construction. However, there is no occasion for arguing this point; for it is clear there is no pretence for making it. The testator has exempted his personal estate, and has substituted two other funds in its room, to be applied in their turns: I am therefore clearly of opinion, that the debts, &c. are charged in the first instance on the Essex estate.

As to the question on the leasehold premises, it seems not distinguishable from the common case of chatel leases, passing by a general residuary clause, though purchased after making the will. I therefore shall declare Mrs. Williams to be entitled to the personal estate (including these leasehold premises) dicharged from payment of the testator's debts, funeral expenses, and legacies.

In Court. Master of the Rolls, for Lord Chancellor. July 4, 1786.

DENTON *versus* STEWART.

On a bill for a specific performance of an agreement for the sale of a house the plaintiff made out his case; but it appeared that the defendant had actually sold the house to another person for a valuable consideration, and without notice.

The Court directed the *Master* to inquire what damages the plaintiff had sustained by the non-performance of the agreement, and that such damages together with the costs of the suit, should be paid by defendant.

This was a bill for the specific performance of a parol agreement for the sale of a house, charged to have been carried into part execution on the part of plaintiff. The agreement was made in the year 1780, and in fact the plaintiff had been in possession of the house from that time until lately, when the defendant obtained judgment in ejectment, and turned out the plaintiff by a writ of possession, who thereupon filed this bill.

It was said by the defendant, that according to the present practice in the Courts of Law, such an agreement might have been given in evidence on the trial of the ejectment; and if proved, would have been a good defence; but his Honour said, he had lately spoken with the Judges of the King's Bench concerning this practice, and that he had learnt from them, that such agreements were admitted only, where they were so perfectly clear as to admit of no dispute; but if there was the least doubt possible, whether they were such as could be executed by a Court of Equity, the Courts of Law would never determine the point.

His Honour was of opinion on the circumstances of the case, that there was such a part performance on the part of the plaintiff (such as furnishing and repairing the house) as would entitle her to a specific performance of this agreement, though only parol; but the defendant stated in his answer that he had actually sold the house to another person for a full valuable consideration: and his Honour thereupon ordered, that the defendant having so stated by his answer, it should be referred *to the Master*, to inquire what damages the plaintiff had sustained by the defendant not performing his agreement, and what the Master should find to be the damage in such respect, together with the costs of the suit, should be paid by the defendant to the plaintiff.—*Reg. Lib. A.* 1785, *fol.* 177.

Todd v Gee 17 Ves. 278. 5 Ves & G. 1.
Selling v Lumley 3 Ves. J. 496.

MACKRETH *versus* MARLAR.

At the Rolls. Sir Lloyd Kenyon. July 10, 1786.

An estate was sold by auction, and the purchase was to be completed in two months according to the conditions of sale. The buyer died soon afterwards, and suits were instituted both in the Spiritual Court and the Court of Chancery respecting his affairs, which prevented the completion of the contract. Four or five years after the sale the vendor filed his bill to have the contract rescinded, and the affairs of the buyer still remaining unsettled, the Court rescinded the contract and gave the plaintiff his costs out of the deposit.

This was a bill against the representatives of William Whittaker deceased, to have a contract delivered up or cancelled, which had been entered into by the plaintiff for the sale of an estate in the county of York to the said William Whittaker for the sum of 7950*l.* The circumstances of the case were these: The estate was sold by public auction on the 19th of September 1781, under the following conditions of sale: "That the purchaser was to pay down immediately a deposit of 15*l.* per cent. in part of the purchase money and sign an agreement for payment of the remainder on or before the 30th of November 1781, on having a good title made by the proprietor: that the purchaser should have a proper conveyance of the estate at his own expense, on payment of the remainder of the purchase money, and all outgoings should be cleared to Michaelmas 1781, from which time the purchaser would be entitled to the rents and advantages of the parts let and possession given of the parts in hand at the completing the purchase, and that if the purchaser should fail or neglect to comply with any of the conditions, then the deposit money was to be forfeited, and the estate resold."

William Whittaker being the highest bidder at the price aforesaid, made a deposit at the rate of 15*l.* per cent. amounting to the sum of 1192*l.* 10*s.* and a memorandum or agreement was indorsed on the said conditions of sale as follows: "London, 19th September 1781. I have this day purchased of Messrs. Skinner and Co. Lot 8, in the Particular, at the sum of 7950*l.* and have paid a deposit of 1192*l.* 10*s.* and promise to complete the purchase according to the conditions of the sale, William Whittaker."

Soon after the sale, before the contract was carried into execution, William Whittaker made his will dated 5th January 1782, and thereby devised all his freehold

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messuages, lands, &c. to trustees in trust for his nephews Abraham Whittaker and John Whittaker and their respective children in strict settlement, with remainder to his nieces Diana, Charlotte, and Mary Ann Whittaker in fee; and then after reciting the above mentioned contract for the purchase of plaintiff's estate, he gave all the residue of his personal estate to the defendants, Marlar, Prime, G. Pollard, and J. Pollard, upon trust in the first place to pay the remainder of the said purchase money, and complete the said purchase, and to take from the plaintiff good and effectual conveyances of the said estates to them and their heirs in trust for the same uses and purposes as his other freehold estates had been limited as aforesaid, and appointed them executors.

The testator soon afterwards, on the 12th of January 1782, died, without having completed the said contract, and upon his death a caveat was entered in the Prerogative Court against proving the will, and a litigation of considerable length took place there, during which time there was an administrator *pendente lite;* but in March 1784, probate of the said will was granted to the defendants. A bill was also filed in this Court to establish the testator's will, and to carry the trusts thereof into execution. In July 1784 a decree was made in that cause, by which the will was established, and accounts were directed of the personal estate, and it was also directed that the Master should inquire whether the contract with Mackreth had been carried into execution (Mackreth not being a party to the suit), and if the Master should find such contract had not been carried into execution, then to inquire what remained due of the purchase money, and that the executors should complete such purchase and pay the residue of the purchase money. The accounts were now subsisting before the Master, before the conclusion of which it was uncertain whether there would be assets of the testator sufficient to complete this purchase entered into with the plaintiff.

The plaintiff now insisted, that he having sold this estate for the convenience of having the purchase money

paid to him immediately, and the conditions of sale and Whittaker's agreement expressly stating, that the said contract should be completed by the 30th of November 1781, and the said contract still remaining unexecuted, it was unreasonable that the plaintiff should at this distance of time be liable be called upon to complete the said contract, when his sole object in selling the said estate was defeated by the delays which had taken place; and even now it was very doubtful, whether there would be assets of William Whittaker for this purpose; or at least the plaintiff would thereby be bound to abide the conclusion of a very long and perplexed account before the Master, contrary to the express stipulations of the sale.

To account for this delay it was said on the part of the defendants, that in the first place some objection had been raised to the plaintiff's title, and that it had been suggested by the conveyancer who perused the abstract, that it would be necessary for the plaintiff to suffer a recovery; but before this point was settled Mr. Whittaker died: that in consequence of the litigation in the Prerogative Court respecting the validity of the will, they had been advised by counsel, that nothing could be done toward completing the said purchase. This tied them up to March 1784, but the delay from that time to the 16th of April 1785, when the bill was filed, was not otherwise accounted for than by the reason of the pendency of the accounts of the personal estate of Whittaker before the Master, under which circumstances the defendant submitted whether they were enabled to complete the contract.

Master of the Rolls.—This is the case of an agreement which by the express stipulation of the parties was to be completed by the 30th of November 1781, and agreements under such circumsances should as far as possible be literally performed. I remember a case before Lord *Thurlow*, where a bill was filed for the performance of an agreement for the purchase of a place for a Jewish Synagogue, and on account of the delays of the party, the bill was dismissed with costs. I am perfectly well satisfied with the good sense and justice of that decision. Now in

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this case are the delays on the part of Whittaker's executors sufficiently apologized for? As to the decree in this Court in 1784, it is *res inter alios acta*, and cannot touch Mr. Whittaker's interest; that therefore I lay totally aside. With regard to the difficulties attending the proving the will in the Ecclesiastical Court, Mr. Whittaker's representatives are not blameable for the delay occasioned by them; but yet those difficulties ought not to affect Mr. Mackreth; and I am of opinion if the case rested upon that, those very difficulties would be a ground to relieve the plaintiff. However all these difficulties were removed on the 31st of March 1784, from which time more than a year elapsed, before the present suit was commenced. Now how can the defendants be said to have used due diligence? At first two months was the time stipulated for completing the contract; shall I add to that time ten months or a year? It has been suggested that the plaintiff has been guilty of delays; but what are those delays? He waited patiently till 1785, when he filed the bill: he did not plunge them hastily into a law suit; but he left them *locum pœnitentiæ*. In May 1783, he stated to them his inconveniences, and that his object in selling the estate was defeated by the delay. If *he* had brought an action to recover his deposit, he must have succeeded. I think therefore that *on these circumstances of delay*, which cannot be imputed to Mr. Mackreth, I am bound to relieve Mr. Mackreth from the contract. But there are difficulties beyond this; it is uncertain whether there are assets of Whittaker to complete the purchase; then it is said that Mr. Mackreth hath an equitable lien on the estate for the residue of the purchase; so that for a ready money sale he is to wait for recoveries to be suffered by the infant devisees. Upon the whole, I am clearly of opinion, that Mr. Mackreth is entitled to the relief he prays, and to have this contract delivered up, and to have his costs, which he shall deduct out of the deposit, the residue of which with interest on the whole at 4 per cent. must be repaid to defendants.

COUNTESS OF STRATHMORE *versus* BOWES.

In Lincoln's Inn Hall. Master of the Rolls for Lord Chancellor. July 11, 1786.

For this case on the first hearing, see 2 Brown Cha. Rep. 88.

Where an injunction to stay waste has been obtained on bill filed and affidavit the defendant may immediately on coming in of his answer move to dissolve the injunction without obtaining any order *nisi*; but then his answer can only be received as an affidavit, and the plaintiff may read affidavits in contradiction to it: and if afterwards upon exceptions the answer appear insufficient, the injunction shall be revived.

On the last day of the term, the answer in the mean time being put in, by which the defendant swore, that he had not cut, nor intended so to do, any timber or ornamental trees, or any saplins, although the woods received injury from some of them not being weeded out, and the plaintiff not having excepted to the answer, the defendant moved to dissolve the injunction, in the first instance without obtaining any order *nisi*.

His Honour on hearing the answer read thought the plaintiff could not sustain the injunction, and intimated that he should take the answer to be *true pro hac vice*, and also to be a full one, not being excepted to.

Mansfield for plaintiff insisted, that the time for excepting to the answer had not yet expired, but that in cases of this nature when the injunction is obtained before answer, the defendant being at liberty to move to dissolve the injunction in the first instance on the coming in of the answer, without any order *nisi*, the practice was that the answer was merely to be read as an affidavit; and Mr. Dickens the register said, that if the injunction should be dissolved, yet on exceptions being allowed to the answer, the injunction would be revived. *Mansfield* offered to read the affidavits again in opposition to the answer; but his Honor doubting of the regularity of this, ordered the motion to stand over from the last day of term to this day, being the first seal, that precedents might be looked into.

It was now mentioned again, and Mr. *Mansfield* and *Bicknell* mentioned several precedents for reading the affidavits. They were taken by *Bicknell* from the register books, *Gibbs* v. *Cole*, (3 *Wms.* 255.) "Order for injunction 27th of April 1734. Order *nisi* to dissolve the

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injunction on coming in of the same, 1st May 1734. Order for continuing the injunction upon (*int. al.*) the affidavit of John Barlock, sworn 30th of April, and filed 1st of May 1734."

Ryder v. *Bentham*, (1 *Ves.* 513.) "July 1750 bill filed. On the 2d, 3d, and 5th of August, affidavits to obtain injunction filed. On the 6th of August answer filed. On the 8th of August affidavits of Jennings and three others sworn and filed. On same day the motion was heard and the order made for the trial at law and an injunction. The above affidavits, and particularly that of Jennings and others, were read all through; but Jennings's was made on behalf of the defendant," *Attorney-General* v. *Bentham*. On the 3d of July 1755 order for injunction on reading the bill and affidavits."

His Honour however said, that although he thought the affidavits ought to be read, both on the precedents cited and on the reason of the thing, yet as it so materially concerned the practice of the Court, he would not decide it, until he had an opportunity of consulting the *Lord Chancellor*.

Whereupon the defendant in order to avoid this delay consented to the reading the affidavits, and they were accordingly read on both sides, and his Honour was of opinion that the affidavits on the part of the defendants were so much stronger than those on the part of the plaintiff, that independent of the answer, the injunction ought to be dissolved.

In Linc. Inn Hall. Master of the Rolls for Lord Chancellor. July 14, 1786.

PARKER *versus* TOULMIN.

Quere, Whether it be competent to a court of equi-

This was a bill filed by the plaintiffs as executors of Sir Hyde Parker deceased, (amongst other things) for an account of a sum of money received by the defendant Toulmin, into whose hands it had been paid after the death

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of his father, who was agent for two Dutch prizes, captured by the Fairy sloop of war, in the course of the late war. This money was the amount of 1-8th part of the produce of these prizes, and claimed by the plaintiffs as the share of Sir Hyde Parker in the said capture; and the question in the cause was whether the Fairy sloop, having been ordered round from Portsmouth to carry the Lord Chancellor of Ireland from Parkgate to Dublin, was to be considered as having sailed under the immediate orders of the Lords of the Admiralty, or under the orders of Sir Hyde Parker, as flag officer commanding at Plymouth, in which case he would be entitled to 1-8th part of the capture.

ty, to determine whether a ship of war was or was not at the time of the capture, one of the squadron under the command of a particular officer.

His Honor heard the cause, but from the beginning intimated great doubts of the jurisdiction of this Court to determine this question, as belonging exclusively to the cock pit, as the court of prizes; and he directed the cause to stand over to this morning to have this point considered.

And now *Scott* and *Richards* produced precedents to prove that although the question of prize or no prize, unquestionably belongs exclusively to the Court of prizes, yet, when once condemned to particular ships the Courts of law have *concurrent* jurisdiction with the Court of prizes, in determining who shall share the prize-money under the act of parliament and proclamation. *Scott* first read a positive opinion to the effect by Lord *Mansfield* on the first argument of the case of *Sutton* v. *Johnstone*, before Lord *Mansfield* and Lord *Loughborough* on a writ of error from the Exchequer. He also mentioned *Wemys* v. *Linzee*, *Doug.* 310. *Mackenzie* v. *Maylor*, *K. B.* 10th November 1784. (from a note of Mr. Douglas's.) *Elliot* v. *Davies* which was an action tried in K. B. on 4th December 1782, and in which the question was, whether Commodore Elliot was entitled to his share of prize money, having struck his pennant on coming into company with a senior captain, and it was said that in all the above cases, the Courts of law had made no scruple in deciding the question of the shares belonging to the particular persons in the ship, the

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Court of prizes having once condemned the prize to that ship, and this question was nothing more, than whether the Port Admiral was to share in the distribution of the prizes condemned to the Fairy Sloop.

Madocks on the other side distinguished the cases cited from the present, by saying that they related merely to the distribution of the prize money amongst the individuals of the ship to which it was condemned; whereas it was necessary in this case that the prize should be condemned to the Fairy, *as one of the squadron* under Sir Hyde Parker, in order to entitle him to his 1-8th part; and he mentioned the words of Mr. Justice *Buller* in *Lecaux* v. *Eden*, *Doug.* 580. as intimating an opinion that the Court of prizes had an *exclusive* jurisdiction in the question of prize or no prize, and *all its consequences.*

The Master of the Rolls said, he thought there was great weight in the distinction made by *Madocks*, and that he felt so much doubt upon the question, that he would not determine it; but the Courts of law might if they thought fit. And his Honour retained the bill with liberty for the parties to proceed at law, for which purpose some particular directions were given.

In the Exchequer. Barons Eyre, Hotham, Perryn. July 18, 1786.

BLAKE *versus* BLAKE.

A. possessed of a church lease for three lives devised it to trustees for certain purposes, till his son R. should attain 21, and when his said son should attain that age, he directed his

Robert Blake the elder, by will of the 4th of February 1752, devised amongst other estates, an estate which he held by lease of 5th June 1751 from the Bishop of Bath and Wells for three lives, to trustees for certain purposes till his son Robert Blake should attain twenty-one, and when his said son should attain that age, he directed that his said trustees should stand seized to the use of his son Robert, and the heirs male of his body: and for want of heirs male of his body, to the use of the issue female of his body, and for want of such issue upon trust for certain purposes therein mentioned; but his will was, that if his

wife should be with child at his death, such child should, if his son Robert should die without issue, inherit all his before mentioned lands, &c. in the same manner and with the same limitations as Robert was to inherit by his said will.

trustees to stand seized of it to the use of his said son and the heirs of his body. And by a codicil he directed that if his son R. should die without issue, his son P. should inherit the estate in the same manner as R. was to inherit it. R. being *quasi tenant in tail*, if he surrender this lease and take a new one to himself and his heirs for three new lives, there is no equity on behalf of P. to make R. or his devisees, trustees of the new lease for P.

Afterwards the testator had another son, the plaintiff, and by codicil to his will, he directed that if his son Robert should die without issue, the plaintiff should inherit all his real and personal estate, in the same manner in which Robert was to have inherited.

The testator Robert Blake the elder afterwards died leaving Robert his eldest son, and the plaintiff his only other child.

Robert attained twenty-one and suffered a recovery of the freehold estate, and surrendered the lease of the leasehold estate to the Bishop of Bath and Wells, and took a new lease on the 6th of June 1770 to himself and his heirs for his own life, the life of A. B. and the life of the plaintiff his brother, the last being added in lieu of the father's life, which was in the lease of 1751. He paid the fine and fees on the renewal, and the business was concluded without the concurrence of the trustees in the father's will. It did not appear that a surrender of the old lease was made by deed; but the new lease was expressed to be made in consideration of a surrender of a former lease, which was delivered up to the Bishop's register and cancelled.

Afterwards Roberts died without issue, having made a will and diposed of his property, and (amongst the rest) of the leasehold estate, to the defendant Frances his widow for life, with limitations over.

The bill was brought to have the benefit of the new lease, insisting that the surrender of the old lease and the taking of the new one, was not sufficient to bar the limitation to the plaintiff in the will of Robert the father; and that those claiming under Robert the son, ought to be declared trustees of the new lease, for the plaintiff John Blake.

It was argued by *Madocks*, *Scott*, and *Waller* for the plaintiff, and *Burton*, *Mitford*, and *King* for the defendants.

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The Court was clearly of opinion, that by the act of renewal, the estate which had been bound by the trusts in the will of Robert the father was devested; and the effect of the new lease by the Bishop to Robert the son was, that he took a new estate different from that which he took under his father's will; that there was no way by which the whole could be made subject to the trusts in the father's will, but by declaring that the new lease should be subject to those trusts: that a Court of equity could not have called upon Robert the son, who was tenant in tail, to have declared such a trust in his lifetime, and that there was no stronger equity against his representatives. The bill was therefore dismissed; but without costs as to this part of the case.

On the point on which the Court decided, *Can* v. *Can*, 1 *Vern.* 480. was mentioned.

At the Rolls. Sir Lloyd Kenyon. July 21, 1786.

BASSET *versus* PERCIVAL.

D. devised estates to trustees for a term of years in trust to raise money for payment of all his debts and legacies, and subject to that term he limited the estates in strict settlement with the ultimate remainder to his own right heirs. By the falling-in of the intermediate limitations, A. and

Matthew Deare by will of 15th January 1746 devised estates to William Basset and John Percival for 500 years, in trust to raise by sale of timber, or sale or mortgage of the estate for the term sufficient to pay his debts by specialty or simple contract, and his legacies, and he gave his personal estate to his sister Catherine Power whom he made executrix of his will, and directed his personal estate to be the primary fund for payment of his debts and legacies; subject to the term he devised the real estates in strict settlement with the ultimate remainder to his own right heirs.

Catherine Power applied the personal estate in payment of some of the debts, and all the legacies, except a legacy to herself of 1000*l.* and then died. During the subsistence of the limitations in strict settlement created by the will,

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and after the death of Catherine Power, her representatives filed a bill to have a debt due to Catherine Power, and her legacy raised; and the only person then entitled under the limitations in strict settlement by the will, dying pending the suit, by which event the ultimate limitation to the testator's right heirs took place, a supplemental bill was filed against Margery Deare, the only sister of the testator then living, and Matthew Deare Percival, the son of a deceased sister, who had become the right heirs of the testator, and entitled to the estate under that limitation.

B. became entitled to the estates as right heirs of the testator. The testator's debts and legacies remaining unsatisfied, A. and B. executed joint bonds for the amount of them, and then A. died. These bonds are not debts of A. to which his personal estate is primarily liable, but they must be born in the first instance by the devised estate.

To stop this suit Margery Deare and Matthew Deare Percival liquidated the demands of the representatives of Catherine Power at 2070*l.* and gave their joint and several bond, dated the 11th July 1781 for that sum to Church and his wife, who assigned the demand to Ann Basset.

Matthew Deare, the original testator, was indebted to other persons in 3270*l.* which were not paid by Catherine Power out of his personal estate, but were paid by William Basset the trustee of the 500 years term, who obtained assignments from the creditors; and Ann Basset, his widow, afterwards obtained a joint and several bond, dated 1st February 1782 from Margery Deare Percival for the 3270*l.* and interest. William Basset also had obtained an assignment of an old mortgage for 400*l.* so that Ann Basset or Cecil White, who was administratrix of William Basset in trust for her, became the sole creditor on the estate.

Margery Deare died, having by her will devised her share in the testator's estates, subject to incumbrances, to trustees in trust to sell, and to apply the money arising by the sale (after paying the incumbrances affecting the same) in payment of legacies. She made no specific disposition of the residue of the money, but gave all her goods, chattels, and personal estate of what nature or kind soever, subject to the payment of her just debts and funeral expenses, to her daughter Posthuma Deare, and appointed her said daughter executrix of her will.

Posthuma died in the lifetime of her mother.

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A question arose in the cause which was upon a bill brought by Ann Basset (amongst other things) for payment of 2070*l.* 3270*l.* and 400*l.* and interest, whether a moiety of the sums of 2070*l.* and 3270*l.* for which Margery Deare and Matthew Deare Percival had given their joint and several bonds to Ann Basset, should be raised in the first place out of the personal estate of Margery Deare, or whether the estate of Matthew Deare should be considered as the primary fund for the payment of those demands, and the personal estate of Margery Deare a collateral security, and auxiliary fund only.

For the heir of Margery Deare it was insisted, that the bonds destroyed the original debt, which was a debt by simple contract only, of Matthew Deare as to part, and the residue a legacy given by his will, and that therefore the first demand was personal against Margery Deare in her lifetime, and Matthew Deare Percival, and consequently that one moiety ought to be satisfied as her debt out of the personal estate. But the *Master of the Rolls* was of opinion, that her bond was a collateral security only, and that the estate of Matthew Deare was the original debtor, and ought first to bear the burthen, as between the heir and next of kin of Margery Deare.

The decree was as follows: "His Honour doth declare the wills of the said testator Matthew Deare, and the testatrix Margery Deare well proved, and that the same ought to be established, and the trusts thereof performed and carried into execution, and doth order and decree the same accordingly, and that it be referred to *Mr. Holford*, one, &c. to take an account of the personal estate of the said Matthew Deare, come to the hands of Catherine Power, since deceased (the sole executrix of the said testator) in her lifetime, and come to the hands of William Church and Catherine his wife (as the said Catherine Church was executrix of the said Catherine Power), and to the hands of the defendant Matthew Deare Percival the administrator *de bonis non* of the said testator Matthew Deare, or any of them, or to the hands of any other person

by their or any of their order, or for this or any of their use; and it is ordered that what on the said account shall appear to have come to the hands of the defendant William Church and Catherine his wife be answered by them, and that what shall appear to have come to the hands of Matthew Deare Percival be answered by him, and what shall appear to have come to the hands of Catherine Power in her lifetime, be also answered by the defendants William Church and Catherine his wife, out of her assets; and in case they shall not admit assets for that purpose, then they are to account before the said Master for the personal estate of the said Catherine Power come to their hands, or to the hands of any other person or persons by their or any of their order, or for their or any of their use. And the said Master is also to take an account of the debts, legacies, and funeral expenses of the said Matthew Deare, and to compute interest on such of his debts as carry interest, after such rate of interest as they respectively carry, and on his legacies from the end of one year after his death, after the rate of 4 per cent. per annum, unless any other rate of interest or time of payment is limited by his will, and in that case according to his will. And the said Master is to publish advertisements in the Gazette for the creditors of the said Matthew Deare to come in and prove their debts, and to appoint a peremptory day for that purpose; and such of the said creditors as shall not come in and prove their debts within the time are to be excluded the benefit of this decree. And it is ordered that the personal estate of the said Matthew Deare be applied in payment of his debts, funeral expenses, and legacies in a course of administration; and in case it shall appear that the plaintiff Ann Basset hath paid any of the debts or legacies of the said testator, or any part thereof, his Honour doth declare that she is entitled to stand in the place of such creditors and legatees of the said testator, so paid by her, and also be considered as a creditor on the said testator's estate for his funeral expenses, in case it shall appear that she paid the same. And in case the personal estate of the said testator

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shall not be sufficient for payment of his debts, funeral expenses, and legacies, his Honour doth declare that the deficiency ought to be raised by sale or mortgage of the premises comprised in the term of 500 years, created by the testator's will for that purpose, and now vested in the defendant Cecil, now wife of the defendant J. White: and it being alledged that several contracts have been entered into for sale of part of the premises comprised in the said term of 500 years, the Master is to inquire what contracts have been entered into for sale of any part of such premises, and with whom, and for what price or prices respectively, and whether the same or any part, and which of such contracts are fit and proper to be carried into execution, and the Master is to state the same with his opinion thereon to the Court, and to make a separate report thereof, and after the Master shall have made his said report such further order shall be made as shall be just. And it is ordered and decreed that the Master do take an account of the personal estate of Margery Deare (not specifically bequeathed) come to the hands of the defendants William Church and Catherine his wife, and Elizabeth Deare, as the said Catherine Church, and Elizabeth Deare are administratrixes with the will annexed of the testatrix Margery Deare) or any of them, or to the hands of any other person or persons by their or any of their order, or for their or any of their use. And the said Master is also to take an account of the debts, funeral expenses, and legacies of the said Margery Deare, and to compute interest, &c. And it is ordered that the personal estate of Margery Deare (not specifically bequeathed) be applied in payment of her debts, legacies, and funeral expenses in a course of administration, and that the clear residue of such personal estate be paid into the Bank with the privity of the Accountant-General, to be there placed to the credit of this cause, 'the account of the personal estate of the testatrix Margery Deare,' subject to the further order of the Court."—*Reg. Lib. A.* 1785, *fol.* 783.

In Linc. Inn-Hall;
Master of the Rolls,
Lord Chancellor.
July 24, 1786.

POOLE *versus* SHERGOLD.

ON THE MASTER'S REPORT.

Quere, How far the Court will go in compelling a party to complete a purchase when no title can be made to *some part* of the property.

When this cause came on before the *Lord Chancellor* on the 19th of January 1785, it being suggested that the estate in question had by some acts of plaintiff been rendered of less value than it was at the time of the agreement for the purchase, his Lordship referred it to the Master to inquire whether the estate had been deteriorated in any and what respect since the original purchase. And the Master having reported that the estate was not deteriorated, except by the fall of the value of lands since the time of the original purchase, and except by timber trees blown down which were of the value of 11*l.* 12*s.* 3*d.* and some coppice wood, which had been cut down by plaintiffs at a proper growth, and out of the produce of which the Master having deducted the value of the present coppice, he allowed the surplus (amounting to 9*l.* 11*s.* 5*d.*) to the defendant. The cause came on for further directions on the matter of costs.

It was said for the defendant, that it would be extremely hard to compel him to complete this purchase at so great a distance of time, the agreement having been made in May 1776; that lands were then worth five years purchase more than they now are; and that in fact, the defendant had applied the money intended for this purpose in the purchase of another estate; and that another hardship was, to compel the defendant to take a part of the estate, when he certainly meant to have the whole or none; for it appeared that as to two lots the plaintiffs could make no title, and so indeed as to a small part of two other lots. Now although, strictly speaking, when an estate is sold in lots, a purchaser makes a separate contract for each lot, yet it cannot but be seen, that the defendant meant to purchase an entirety, and of course, that compelling him to take the remainder only would be making a bargain for him which he certainly never would have made for himself.

Poole v. *Shergold.*

On the other hand, it was insisted, that the conduct of the defendant had been vexatious, and his objections frivolous, particularly in occasioning the last reference. With respect to the deterioration of the estate, which turned out to amount to those two very trifling sums, the first of them could not be prevented, and the second was in pursuance of the regular and constant course of husbandry, and which was for the benefit of the estate.

Master of the Rolls.—The Court has most certainly gone a very great length in compelling parties to go on with purchases, contrary to their original agreement and intention; but I am clearly of opinion that a case might be made, where if it turned out that the seller could not make a good title to a part, it might be a sufficient reason to put an end to the whole contract. Such was the case of the Cambridge wharf, where it appeared that the seller could make a good title to all the estate, *but the wharf*, which was the principal object of the buyer in making the agreement. In that case the buyer was compelled to complete his purchase without the wharf, but it was a determination contrary to all justice and reason. But in the present case I am bound to suppose that the lots to which no title can be made, are not of sufficient importance to make the loss of them a reason for vacating the agreement as to the remainder. The steps already taken in the cause by the *Lord Chancellor* must have proceeded on the ground, that the agreement was to be executed notwithstanding this defect, and the same observation applies to the fall in the value of land: with respect to the costs, I think both parties were at first to blame, but latterly Mr. Shergold only. I shall give no costs on either side down to the time of the Master's making his report; but from that time the defendant must pay the plaintiffs their costs.

EXPARTE BOARDMAN.

In Linc. Inn. Hall, Lord Chancellor. Aug. 3, 1786.

PETITION IN BANKRUPTCY.

Lord Chancellor **ruled that separate creditors having received 20s. in the pound, and there being a deficiency for the joint creditors, the separate creditors should not receive subsequent interest until the joint creditors were satisfied.**

At the Rolls. Sir Lloyd Kenyon. Nov. 4, 1786.

HUET *versus* LE MESURIER.

PETITION.

A copy of a register of baptism in the island of Guernsey is not sufficient evidence here of a party being of age.

This was the petition of John and James Sibrell to have money paid to them out of Court, on their having attained their ages of 21 years, and *Mr. Harvey* offered a copy of the register of their baptism in the island of Guernsey, as evidence of their being of age: but his Honour was of opinion, that he could not receive such evidence; that although credit was given by Courts of justice to such registers in this country, as being under the ecclesiastical jurisdiction, yet that the same credit was not due or given to registers of any other place; and therefore that other evidence must be adduced of the fact of the petitioners having attained 21.

At the Rolls. Sir Lloyd Kenyon. Nov. 14, 1786.

LAWSON *versus* WRIGHT.

On a bill filed by a surety against his co-surety and

Nicholson v Stewart 3 Drewry 278. Corporation of Berwick upon Tweed v Murray 7 D. M. & G. 517. Ex parte Bishop 15 Ch. D. 421

Lawson v. Wright.

the principal for a contribution from the co-surety in respect of of money *actually paid* by the plaintiff for the principal, it is not necessary to prove the insolvency of the principal; otherwise where the principal is not a party to the suit.

320*l.* by instalments of 20*l.* each, at times specified in the cause; and Thomas Wright and George Wright became jointly and severally bound with the said George Watson for such payments at the expiration of the time within which the instalments were to be paid. George Watson was a defaulter for 100*l.* whereupon the bond was put in suit against Thomas Wright, and he actually paid the money, after which the said Thomas Wright being dead, the present bill was filed by his executors against George Wright the co-surety, and the said George Watson, the principal, stating George Watson to be insolvent, and praying a contribution from the said George Wright, but praying no relief against Watson. His Honour was very clear on the general equity of the case, and said it had been established ever since the origin of Courts of Equity, that one surety had a right to call on another for contribution in cases of this nature; but his Honour had some doubts whether it was not absolutely necessary to prove the insolvency of the principal, which was not done in the present case. To which objection it was answered by the counsel for the plaintiff, that although such was the rule where the principal was not before the Court, yet the principal being here a defendant, it was competent to the Court to make such a decree, as it could at the same time direct payment from the principal to the co-surety, and it was also suggested, that there might be a difference in the case, where the money had been actually paid by one surety, and where the bill was only under apprehensions of plaintiff being called upon on account of the insolvency of the principal, and that though in the latter case it would be clearly necessary to prove the principal's insolvency, it might not be necessary in the former; but his Honour relied on the circumstance of the principal being a defendant, and decreed that an account should be taken of the money paid by Thomas Wright in respect of the matters aforesaid, and that one moiety thereof should be answered by the defendant George Wright to plaintiff, together with one moiety of plaintiff's costs, and that George Wright should recover over such moiety of

the money and costs, together with his own costs from the defendant George Watson. *Lawson v. Wright.*

The decree was, that it should be referred to the Master to take an account of all sums of money paid by Thomas Wright deceased, and the plaintiff Ann Lawson and Thomas Wright, his executors, or any of them, agreeably to the undertaking in the pleadings mentioned, and compute interest on such sums of money at the rate of 4 per cent. from the times the several payments were made, and to tax the plaintiff the costs of the suit. And it was further ordered that the defendant George Wright did pay unto the plaintiffs one moiety of what should be found for principal and interest as aforesaid, together with the costs of this suit. And it was further ordered that the defendant George Watson did pay unto the plaintiffs the other moiety of what should be found for principal and interest as aforesaid, and did also pay to the defendant George Wright the principal and interest before directed to be paid by him to the plaintiffs, together with the costs of the said defendant George Wright, and also the costs which he should pay to the plaintiffs under the direction before given.—*Reg. Lib. B.* 1786. *fol.* 81.

In Court. Lord Chancellor. Nov. 16, 1786.

EARL OF SALISBURY *versus* CECIL.

Bill filed against a steward for an account of monies received in that capacity, and of the interest made by him of it. By his answer he admitted he received this money and mixed it with his own, and

This bill was filed (amongst other things) for an account from one Wilkinson, who was chief auditor and steward of the late Earl of Salisbury, of all sums of money received by him on account of the said late Earl, and that he might account for the profits made by him of the said Earl's money, which, as was charged by the bill, was from time to time laid out by him in the funds and other securities at interest. Wilkinson, by his answer, admitted that his agents from time to time remitted very large sums of money belonging to the said Earl to his (Wilkinson's) bankers, but said that the same was mixed with his own

Earl of Salisbury, v. Cecil.

money, by which means he was unable to set forth what profits had been made of the said Earl's money. Wilkinson afterwards died before the hearing of the cause, which was revived against his representatives. And it was now moved that the defendant, the representatives of Wilkinson, "might produce at the hearing of the cause all books kept by Wilkinson at his banker's during the time he was chief auditor and steward of the said late Earl:" which motion was made with a view of shewing from the banker's books that Wilkinson did from time to time draw out the Earl's money for the purpose suggested by the bill.

used it accordingly. This admission will induce the Court to direct a production of his banker's books, though they may contain many other private matters.

Lord Chancellor.—From the circumstance of Wilkinson having mixed the money of the late Lord Salisbury with his own, which fact is admitted by his answer, I am of opinion that these books ought to be produced, and such parts selected at the hearing as shall appear to apply to the subject before us. The objection made is, that the books are improper to be produced on other accounts, but a man shall never be at liberty so to fence with justice as to shelter himself under a circumstance arising from his own improper behaviour in mixing the money with his own. And his Lordship made the order, as prayed.—*Reg. Lib. A.* 1786, *Mich. Term.*

At the Rolls. Sir Lloyd Kenyon. Nov. 20, 1786.

MATHEWS *versus* FEAVER.

An assignment of personal property for a consideration *clearly inadequate* is fraudulent as against creditors under 13th *Eli.* But *copyholds* not being naturally subject

The plaintiffs in this cause were assignees of a bond, which was entered into by Robert Feaver (the defendant's father) for securing a sum of 300*l.* being the marriage portion given by the said Robert Feaver on the marriage of his daughter with the defendant James Mathews, and the said James Mathews having assigned the same as a security for two sums of 200*l.* and 100*l.* in which he was indebted to the two plaintiffs respectively, and the said Robert Feaver the father being dead, and leaving the defendant

Prater v. Prater. 2 Cox 196. S.C. 1 Ves. J. 196
Arnold v. Clark 14 Eq. 166

Mathews v. *Feaver.*

Robert Feaver the son his personal representative, the present bill was brought against Robert Feaver the son, for a discovery of his father's assets, and for payment of the said bond.

to the debts, a conveyance of *them* cannot be fraudulent against creditors.

The defendant Robert Feaver, the son, by his answer to the original bill, denied that he possessed assets of his father to any greater amount than 40*l.* but insisted on the benefit of an assignment made by the father to him some short time before the father's death, whereby in consideration of an annuity of 30*l.* to be paid by the son to the father during the father's life, and of natural love and affection, the father assigned over to the son certain copyhold and leasehold premises, and his stock in trade, and several other articles of property therein enumerated.

The amended bill impeached the assignment, as being fraudulent against creditors, and prayed that the personal property might be taken as part of the father's assets.

The facts (either admitted by the defendant's answer or in proof in the cause) were, that at the time of the assignament the defendant Robert Feaver the son had notice of the plaintiff's claim in respect of the said bond; that the father was about 77 years of age, in an infirm state, and not likely to live; that the property assigned was in fact the whole of the father's property, and the value of the *whole* was about 800*l.* (though some of the witnesses called it near 1000*l.*) and exclusive of the copyhold was worth at least 600*l.*

On the part of the plaintiffs, it was said this assignment was clearly fraudulent under the statute 13th *Eliz.*: it was an assignment of the whole property; and he being at the time a trader, it was in fact an act of bankruptcy: that the consideration of natural love and affection was of no avail as against creditors, and this transaction upon the whole seemed directly calculated to defraud the father's creditors.

For the defendant it was said, this was merely the case of an old man wishing to retire from business, and surrendering up his property to his son, upon having an annuity secured to him for his life, and that in transac-

Mathews v. *Feaver.*

tions of this nature the inadequacy of the transaction was not to be rigidly examined, according to *Jones* v. *Marsh*, *Ca. Temp. Talb.* 64.

Master of the Rolls.—If the facts in this cause were all fully established in evidence, I should have no difficulty in determining it. I do not know how this case differs from a case of bankruptcy; though, to be sure, if the bankrupt laws are to be argued from, it is begging the question. If the conveyance had been made without any consideration, it would certainly have been void under the statute; and I am of the same opinion, where the consideration is entirely inadequate. It is true as between vendor and vendee the Court will not weigh the consideration in golden scales; but this is a transaction between the father and the son, and natural love and affection is mentioned as part of the consideration, upon which, as against creditors, I cannot rest at all. It is true, it is a consideration, which though not valuable, is yet called meritorious, and which in many instances the Court will maintain, but not against creditors.

But I am not satisfied as to the nature or the value of the copyhold premises, which, generally speaking, are not subject to debts, and therefore the assignment of them can never be fraudulent against creditors.

There may be copyholds which from their particular tenure, or from the custom of the manor, may be liable to debts, but in this cause I have nothing from which I can judge of the nature of the copyholds in question. I at first thought this case proper to be determined by a jury, but upon reconsidering, I cannot frame an issue which will answer the purpose. I shall therefore direct the Master to inquire what was the value of the property comprehended in the assignment, exclusive of the copyhold; what was nature of the interest of Robert Feaver the father in the said copyhold premises, and by what tenure the same were holden, and what was the custom of the manor acting upon the same, and what was the value of such copyhold premises? and reserve all further directions and costs.—*Reg. Lib. B.* 1786, *fol.* 734.

ROWLEY *versus* RIDLEY.

In Court, Lord Chancellor. Nov. 3, 1786.

A deposition of a witness permitted to be amended after publication where there clearly appeared to be a mistake made by him in a material part of his evidence.

This was a motion to rectify the deposition of a witness under the following circumstances:

The plaintiff filed his bill on the 30th October 1781, and the defendant entered his appearance on the 14th of November following, and obtained several orders for time, and he being in contempt for want of an answer, a commission of sequestration issued against him. Edward Ridley the younger (who was not a party in the cause) claiming to be entitled to part of the sequestered estates as a purchaser thereof for a valuable consideration by indentures of lease and release dated the 13th and 14th of November 1781, the Court directed that the said Edward Ridley the younger should be examined before the Master as to his interest in the said several estates. On the 9th of December 1785 the plaintiff obtained an order for a commission to falsify the examination; and the said commission being executed and returned, and the depositions published, it appeared that William Ridding, one of the witnesses examined thereupon, had sworn, that the subpœna issued against the said defendant to appear to the plaintiff's bill had been served by the deponent on the defendant on the 8th and 11th of November 1781, and the present application was to amend the said deposition by inserting the month of "October" instead of the month of "November."

The only affidavit in support of this motion were those of Thomas Haslewood, the plaintiff's solicitor, and the said William Ridding, his clerk. Haslewood swore that on the 8th of October 1781 he sent the said William Ridding to serve the said defendant with a subpœna, which was returnable on the 6th of November following; that on the return of the said William Ridding he informed the deponent, that he had on the said 8th day of October 1781 left the label of the said subpœna at the dwelling-house of the said defendant; that on finding this to have been an

Rowley v. *Ridley.*

irregular service, he did on the 11th day of October 1781 again send the said William Ridding to serve the said defendant with the body of the said subpœna, and the said William Ridding on his return informed deponent that he had, on the said 11th day of October 1781, left the body of the said subpœna at the said defendant's dwelling-house; and that he made memorandums of these circumstances in his day-book at the time; that the deponent verily believed, that the proof of the actual time of the service of the said subpœna would be material to the plaintiffs in the event of the cause.

William Redding swore positively to the facts of the service as before mentioned, and that the word "November" was inserted in the deposition instead of the word "October," by mistake, but did not add whether the same was a mistake of the Commissioners, or of the ingrossing clerk, or of himself.

In support of the application, the case of *Griells* v. *Gansell*, 2 *P. W.* was mentioned.

Ainge on the other side argued, that this was a dangerous precedent and open to great abuse; if, perhaps, any mistake was made in taking down the witness's words or meaning, it might be rectified; but here there is no proof whatever of any mistake being made, except by the witness himself; and if such a precedent were to be allowed, any witness who after publication found that his deposition could not be reconciled with the other proofs in the cause, would always make a similar application; that the affidavits in *Griells* v. *Gansell* were much stronger to shew, that the witness's words or meaning were mistaken by the Commissioners or the engrossing clerk.

It was then observed on the part of the plaintiff that the subpœna being returnable on the 6th day of November, was a very decisive proof that it must have been a mistake, when the service of it was sworn to have been some days afterwards; that this fact would be material, because the question was whether the said Edward Ridley did or did not purchase the premises with notice of this suit.

Lord Chancellor.—This deposition having been so taken,

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and no evidence being brought on the part of the Commissioners, it must be understood that in fact the witness did say "November," and not "October:" otherwise the Commissioners should have attested it. It is also true that it is a matter of great delicacy to alter a deposition after publication, and nothing will justify it but the strongest conviction of a mistake having been made; the slightest ground for supposing that an indictment for perjury could be maintained is sufficient reason for not altering it; but if it is a *mere mistake*, nothing would be made of an indictment; but in this case I cannot conceive, but that it must be a mistake in the witness; and then I could not do justice to the party in the cause, if I did not permit it to be amended. The deposition must be therefore amended in the manner required, and must be resworn by the witness.

CARNAN *versus* BOWLES.

In Chancery, Lord Thurlow. Nov 23, 1786.

Quere. What differences between two books will be sufficient to resist an application for an injunction to restrain defendant from publishing the latter work.

The original reference to the Master in this matter was "to look into the book published by the plaintiff, under the "title of 'A new and accurate Description of all the "direct and principal Cross Roads in Great Britain,' and "also into the book or pamphlet published by the de-"fendant Bowles, under the title of 'Paterson's British "Itinerary, being a new and accurate Delineation and "Description of the direct and principal Cross Roads of "Great Britain,' and see whether *they are the same book*, "or *in what respect* they differ."

The Master, by his report, certified that he had proceeded to examine the two books, "and found that *they were* "*not the same* book, and that they differed in the following "respect, viz. the one published by the plaintiff is a descrip-"tion of the roads of Great Britain in letter-press, whereas "the other published by the defendant is, as the title

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" announces, a description and delineation from copper-
" plates, of a great part of the roads of Great Britain, and a
" description of the remainder of the said roads in letter-
" press; that the difference was obvious on inspection, the
" one being a description only of the said roads, the
" other containing the roads themselves, delineated on 179
" maps or charts, shewing likewise the villages and gentle-
" men's seats in the adjacent country, and consequently
" containing much more matter, than was or could be con-
" tained in the work published by the plaintiff: and with
" regard to the roads which are in both books described
" in letter-press, he found that there were many small
" differences, additions, corrections, and variations,
" and he also found that both books were the work
" of the same author, viz. the defendant D. Paterson,
" and had both the name of the said D. Paterson in the
" title pages of the said books; but that the said roads
" *were in substance nearly the same.* He found also that
" they differed in price, the plaintiff's being sold for two
" shillings, and the defendant's for two guineas."

On this report the matter came on before the *Master of the Rolls*, sitting for the *Lord Chancellor*, on 20th June 1786, (*vide* 2 *Bro. Cha. Rep.* 80.) when his Honour ordered that an injunction should be awarded to stay the defendants, Daniel Paterson and Carrington Bowles, their servants, workmen, and agents, from printing, publishing, and vending the book in the bill named, called, &c. so far as the *letter-press parts* thereof, until the hearing of the cause, or the further order of the Court.

The defendants now moved to discharge this order of his Honour's, and the point was fully argued, as well on the form of the Master's report, as the merits of the case.

The *Lord Chancellor* said, that as the roads of Great Britain were open to the inspection and observation of all mankind, every one was at liberty to publish the result of such observation: the subject matters of these books were therefore *in medio*: but the question will be, whether the author has exhibited any new and distinct idea in the exposition of them; and then whether the subsequent

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editor has in substance adopted the same. When globes were first invented, this was a *new scheme* of exhibiting the face of the earth, different in substance from the plain chart. Now then the addition of a few places on the globe will not make a new invention, the *substratum* being the same. So in the case of Newton's Milton, the Court thought that Milton's Works were *in medio*, but the notes and other editions were not so, and therefore as to them restrained the publication, though they left the text open to any body. Now here if the scheme of exhibiting this information to the public is substantially and fundamentally the same in the second work as in the first, and the former is merely reprinted with such differences as not to amount fundamentally to a different project of exhibition, the law ought to interfere and protect the exhibition. His Lordship thought the report not sufficiently clear, and directed that it should be again referred to the Master, whether the books were the same, or whether the latter differed from the former so as to render the *same* a new *and original* work in any and what particulars.

WHITTAKER *versus* MARLAR.

In Lincoln's Inn Hall, Lord Chancellor. Dec. 7, 1786.

It having been referred to a Master to see whether a suit instituted in the name of infants by a *prochein amy* was necessary, and to state any special circumstances with his opinion thereon, the Master by his report stated several circumstances, and certified the said suit to be necessary. It was now moved that the said report might be confirmed, and that the bill might be dismissed with costs to be paid by the *prochein amy*, or by the plaintiff's solicitors. On the counsel entering into the observations on the evidence before the Master, it was at first doubted whether this would not be a more proper subject for exceptions to the report; but the Register *Mr. Dickens*, being consulted, declared it to be the practice of the Court, not to except to

Nothing short of a dishonest intention will be sufficient to fix a *prochein amy* personally with costs. No degree of mistake or misapprehension will be sufficient.

A Master's report on a reference to inquire whether a suit institut-

Whittaker v. *Morlar.*

reports of this kind (which were in the nature of cases for the opinion of the Court), but to object to them on motion to confirm.

ed in the name of an infant by a *prochein amy* was necessary, is not a subject for exceptions; but any objection to it must be made on the motion to confirm the report.

The *Lord Chancellor*, after hearing this motion very much at length, declared, that no degree of mistake or misapprehension would be sufficient to charge a *prochein amy* with costs. Whoever will stand forward in that character on the behalf of infants, is to be encouraged to every possible extent, while he *can be supposed to intend the infant's benefit*. Then the question is reduced to this, whether the bill was filed with a fair intention, or merely to answer any purpose of spleen; if so, the same principle which guides the Court in encouraging an *honest prochein amy*, that is, the anxiety to have the affairs of infants properly taken care of, will involve a *dishonest* one in the expenses of his own proceedings. Upon the whole of the present case it is impossible to suppose this suit could be fairly intended; the Master is therefore right in reporting this suit to be improper, and it seems *so* improper that it is ridiculous in any age of common sense to suppose the *prochein amy* could be so far *mistaken*, or that he could be fairly advised to institute this suit. The bill must therefore be dismissed, with costs to be paid by the *prochein amy*, together with the costs of this present application.

In this case the counsel for the *prochein amy* alledged that the suit had been instituted by the solicitor altogether without his privity or consent, in confirmation of which a written acknowledgment by the solicitor was produced, whereby he avowed having instituted the suit without the privity of the *prochein amy*, and the counsel for the *prochein amy* had no instructions to resist the present motion, any further than to pray that the solicitor might be directed to pay the costs; but the *Lord Chancellor* was of opinion, that in the present stage of the business the Court could not take notice of the question as between the *prochein amy* and the solicitor, but must take it to be the act of the *prochein amy*, who ought to make a direct application against the solicitor, if he had acted improperly.

CONSTANTEIN *versus* BLACHE.

Inn Linc. In Hall, Lord Thurlow. Dec, 9, 1786.

ON SHEWING CAUSE AGAINST DISSOLVING AN INJUNCTION.

Plaintiff being insolvent agreed with his creditors that they should take 15*s.* in the pound in satisfaction of their debts. One of the creditors refused to come in unless plaintiff gave his promissory note for the remainder, which was done. There was no stipulation in the composition deed that all the creditors should accede to it within a given time, nor did it appear in fact that all the creditors had done so.

The Court will restrain defendant by injunction from proceeding at law on the promissory note.

The plaintiff was a sugar baker, and having become insolvent, he proposed to his creditors to take a dividend of of 15*s.* in the pound for their debts. The defendant, one of the creditors, would not accept the composition unless the plaintiff gave a promissory note for the remainder of the debt, which he accordingly did, and made it payable two years after date. It did not appear that all the plaintiff's creditors had come into this agreement, or that there was any proviso that the agreement should be void, if all the creditors did not come in by any certain time. On the expiration of the two years the defendant proceeded at law on his promissory note, and the plaintiff filed this bill; the defendant having before received his 15*s.* in the pound.

It was argued, that although the Court had in many cases expressed a disapprobation of underhand securities of this nature, yet no case had been decided which came up to the present. In all the other cases it appeared that all the creditors had come in, or that there was a proviso that all should come in by a certain time, or the whole should be void: and the principle of these cases was, that there was a mutual confidence and implied contract amongst the creditors, that no one should receive more than another; and in *Earl of Chesterfield* v. *Janssen*, 2 *Vez.* 156, *Lord Hardwicke* lays particular stress on there being a proviso for all creditors to come in by a time certain: so in *Spurrel* v. *Spiller*, 1 *Atk.* 108, all the creditors came in; but in the present case there is no proof that all the creditors came in, and therefore each creditor had a right to make his own bargain, and to get the whole of his debt if he could, as is said in *Lewis* v. *Chase* 1 *P. W.* 620.

Constantein v. Blacke.

But the *Lord Chancellor*, without hearing the other side, was most clearly of opinion that this was within the principle of all the other cases, and thought that this very point had been repeatedly decided.

In Lincoln's Inn Hall. Lord Chancellor. Dec. 9, 1786.

TOZER *versus* TOZER.

After rejoinder a defendant cannot move to dismiss a bill for want of prosecution.

After rejoinder it was moved to dismiss a bill for want of prosecution; and it was said that this motion was proper at any time before the rule to produce witnesses. But the *Lord Chancellor* said, he thought otherwise; for the reason of allowing the defendant to dismiss the bill for want of prosecution before issue joined is, because till then the *defendant* cannot proceed *himself*; but as soon as issue is joined he may.

In Serjeants Inn Hall. Lord Chief Bar. Skynner, Barons Eyre, Perryn. Dec. 18. 1786.

JONES *versus* BOULTER.

On the treaty of marriage between A. and B. the father and mother of B. in consideration of the settlement to be made by A. join in conveying a small estate (out of which the mother was dowable) to A. in fee; (but no fine was levied),

Joseph Boulter was seized in fee of certain messuages, &c. in Eckington in the county of Worcester, of the annual value of 156*l.* 8*s.* subject to two mortgages of 600*l.* and 300*l.* and was also seized in fee of other premises situate at Comberton in the same county, of the yearly value of 13*l.* or 14*l.* A treaty of marriage having taken place between one John Boulter (who though of the same name was no relation of Joseph Boulter) and Mary the only child of Joseph Boulter and Hannah his wife, by indenture of lease and release dated the 29th and 30th days of June 1775, and made between the said Joseph Boulter and Hannah his wife of the one part, and the said John Boulter of the other part, reciting that a marriage was intended to be had between the said John Boulter and Mary Boulter, and that as part of the marriage portion of

Croft v. Middleton 2 D. M. & G. 204.

Jones v. Boulter.

the said Mary, the said Joseph Boulter for the considerations therein after mentioned, had agreed to release to the said John Boulter and his heirs all the said premises therein mentioned, it was witnessed that in consideration of the said intended marriage, and as part of the marriage portion of the said defendant Mary Boulter, and in consideration also of the settlement intended to bear date therewith (hereafter stated) and in consideration of the natural love and affection which the said Joseph Boulter and Hannah his wife had towards their said daughter Mary, and for other considerations, they the said Josph Boulter and Hannah his wife, gave, bequeathed, released, &c. all the said premises at Comberton to the said John Boulter in fee.

By indentures of lease and release of the same dates, the release being of three parts, and made between George Boulter Clerk, father of the said John Boulter, and the said John Boulter of the first part, the said Joseph Boulter and Hannah his wife and Mary their daughter, of the second part, and Thomas James and Edward Hindman of the third part, reciting the said intended marriage, and in consideration thereof, and of the said conveyance so made by the said Joseph Boulter and Hannah his wife to the said John Boulter as aforesaid, and for other considerations, he the said George Boulter granted and released to the said James and Hindman and their heirs a certain freeh old estate in Eastham in the said county of the yearly value of 40*l.* to the use of the said George Boulter and his heirs until the solemnization of the said intended marriage, and from thence to the use of the said John Boulter for life, remainder to Mary for life in bar of dower, remainder to such persons as John Boulter should by deed or will appoint, and in default thereof to the use of the heirs of the body of the said Mary by the said John Boulter, remainder to the heirs and assigns of the said John Boulter for ever. And it was thereby further witnessed, that in consideration of the said marriage, and for the settling and assuring the several premises therein after mentioned, and of the settlements made by the said

and they also joined in settling another estate of which the father was seized in fee on the father for life, *remainder to the mother for life*, remainder to the uses of the marriage. At the time of the settlement the father was indebted by specialty. This being a fair and reasonable family settlement, and not made with any view to defeat creditors, the limitation to the mother for life is not fraudulent as against creditors, within the statute 13th *Eliz.* more especially as she had joined in conveying the small estate in fee to the husband.

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George Boulter for the said Mary Boulter and her issue, the said Joseph Boulter and Hannah his wife did grant release, &c. all the said premises in Eckington to the said James and Hindman and their heirs, to the use of the said Joseph Boulter and his heirs until the said marriage should take effect, and from thence to the use of the said Joseph Boulter for life, *remainder to the said Hannah Boulter* for life, remainder to John Boulter for life, remainder to the said Mary Boulter for life, remainder to the use of such child or children of the said marriage, and for such estates as the said John Boulter, or in his default, as the said Mary Boulter should by deed or will appoint, and in default thereof to the use of all and every the child and children as tenants in common in fee.

The said marriage took effect in January 1779; Joseph Boulter died intestate, and indebted by bond to several persons, which debts were contracted prior to the said settlement made on the marriage of his daughter Hannah Boulter. The widow took out letters of administration. The present bill was filed by the bond creditors for an account of the personal estate of Joseph Boulter, and to have the same applied in payment of their said demands, and if the personal estate should not be sufficient, to subject his real estates thereto; insisting that, at least as to the estate for life of Hannah Boulter in the said premises in Eckington, the same was voluntary and fraudulent as against creditors, and that they were therefore entitled to have the rents and profits (at least) during the life of Hannah Boulter applied in satisfaction of their debts.

The defendant Hannah Boulter, by her answer, insisted on the said settlement; but if the Court should think the limitation to her void as against creditors, then she claimed dower out of all the premises of which Joseph Boulter was seised.

George Boulter the father was examined for plaintiffs, and stated he conceived Joseph to be a man of property, but that before the settlement having heard that Joseph was sometimes short of money, he directed his son to inquire of Joseph the state of his affairs, and that Joseph

told the son the whole of his debts amounted to 1000*l.* or 1100*l.* The attorney who drew the deeds stated that he was applied to for that purpose, and that on that occasion Joseph mentioned the mortgages, but no other debts.

Pryce, *Burton*, and *Stratford* for plaintiffs, insisted that the limitation to Hannah Boulter was altogether voluntary; that no limitations can be within the consideration of the settlement but those made to the immediate objects of it, that is, the husband, wife, and issue, or where any person giving up any interest, bargains for himself or any other person: Now, here Hannah Boulter does not give up any thing; for no notice is taken of her dower, and if any body bargains for her, it is Joseph Boulter the debtor; this limitation therefore being purely voluntary must be fraudulent against prior creditors, and the plaintiffs are entitled to have the rents and profits during the life of Hannah Boulter applied in satisfaction of their debts, *Doe* v. *Rutledge*, *Cowp.* 705. *Osgood* v *Strode*, 2 *P. W.* 256. *Hammerton* v. *Mitton*, 2 *Wils.* 356. *Bellingham* v. *Lowther*, 1 *Cha. Ca.* 243. *Fursacre* v. *Robinson*, *Prec. Cha.* 475.

Scott and *Mitford*, for defendants.

It does not appear upon what ground a settlement purely voluntary can be considered as within the statute of the 13th *Eliz.* The spirit of the act was that every settlement to which fraud could be imputed, should not stand in the way of creditors; if there be any reason for the settlement, it cannot be taken as fraudulent, *Cowp.* 434. But in this case the settlement is not purely voluntary as to the widow; she was entitled to dower of the Comberton estate which was conveyed to John in fee, and though she has levied no fine, yet having an estate for life limited to her in the Eckington estate by the second settlement, which was expressly made in consideration of the first, which it rectified, John Boulter had a right to sustain her title to a life interest in the Eckington estate, and to insist that while she held that estate, she was barred in equity, from claiming dower in the Comberton estate; and if she chose

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to relinquish her life interest and take her dower in both estates (the mortgages being subsequent to her marriage) John had a right to apply the life interest in the Eckington estate limited to her by the settlement to compensate for her dower in the Comberton estate. But we also insist that this is not a case that can be deemed a feigned, covinous, or fraudulent settlement as to Hannah, within the statute of the 13th *Eliz.* The Courts have in the construction of that statute considered settlements merely voluntary, as fraudulent against creditors, where the settlor was indebted at the time; but the ground of those determinations was, that by such a settlement the settlor was putting it out of his own power to pay his debts by parting with his property without any reason for so doing, and it was therefore considered, that he could have no other view in making the settlement, but to defeat his creditors. Therefore a voluntary settlement made by a man not indebted at the time, was not deemed fraudulent within the 13th *Eliz.* because not being indebted, he could not have it in contemplation to defeat creditors by making the settlement. If the settlor *was* indebted at the time, and there was sufficient reason for making the settlement to rebut the inference of fraudulent intention ascribed to such an act done without reason, the settlement has not been deemed fraudulent against creditors; and even a *purchaser* claiming the benefit of the statute 27th *Eliz.* cannot avoid a settlement made upon a sufficient reason, though purely voluntary: thus in *Ithell* v. *Beane*, 1 *Ves.* 215, where a husband on his second marriage contracted to pay 400*l.* in trust for his wife, and afterwards for the issue of the marriage and the son by a former marriage, and in the events which happened that son became entitled to the whole 400*l.* it was determined that the creditors of the husband could not come upon this against the son, as being a voluntary disposition as to him. So in *Newstead* v. *Searle*, 1 *Atk.* 265, a settlement by a woman previous to a second marriage on children by a first marriage was determined not to be void against a subsequent mortgagee under the 27th *Eliz.* the settlement

being made for sufficient reasons, and a prudent and proper act at the time. Where there is a consideration for a part of the settlement, that will maintain the whole of it in any degree dependant on it, and accordingly Lord *Hale*, in *Jenkyn* v. *Keymis*, 395, asserted, "that the consideration of the marriage portion would run through all the estates raised by the settlement, though the marriage be not concerned in them, so as to make good against purchasers, and avoid a voluntary conveyance." This doctrine alone supported the case of *Jenkins* v. *Keymis*, and was acknowledged in *Osgood* v. *Strode*, 2 *P. W.* 245. Though in the later case the Judges do not seem to have gone so far, yet any valuable consideration is sufficient to support a settlement, however small, or any circumstance from which it might be presumed, that the limitation attempted to be impeached as voluntary, was part of the stipulations between the parties to the settlement, who treated upon valuable considerations, which was particularly adverted to in *Osgood* v. *Strode*. So in *Jones* v. *Marsh*, *Ca. tem. Tal.* 64, a very small consideration was deemed sufficient; and in *Doe on dem. Hammerton* v. *Milton*, 356, a very small consideration indeed was admitted as having the effect of supporting a settlement, the mere agreement of the mother to accept a part of the estate instead of the whole as a security for an annuity. In the present case there is sufficient to presume, that the estate for life in the Eckington estate given to Hannah was part of the contract with George and John; for she might otherwise claim dower of the Comberton estate, and if she had no provision after the death of her husband, she must have been maintained by her daughter and son-in-law. It was therefore their interest that a provision should be made for her; besides, the provision made must be considered as really taken from them, and not from Joseph, for what would have been the case, if the limitation to her had not been inserted; would the estate have been limited to the heirs of Joseph during her life? certainly not. If no limitation had been made to her, the limitation to John and his wife and their issue would have been immediate on the death of

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Joseph. The provision for her therefore is no injury to the creditors of Joseph; it is in fact taken out of the estate limited to John and his wife, and their children, and could not, according to the common policy of settlements, have remained the property of Joseph, and have been liable to his debts.

Lord Chief Baron.—This case turns solely on the limitation to the widow; the question depends on the construction of the 13th *Eliz.* This statute was made to avoid fraudulent conveyances to the prejudice of creditors, with a proviso "that the act should not extend to any estate or interest in lands, &c. had, made, conveyed, or assured, which estate or interest was or should be upon good consideration, and *bond fide* lawfully conveyed and assured to any person or persons whatsoever, not having at the time of such conveyance or assurance unto them any manner of notice of such covin, fraud, or collusion as is aforesaid." There is no mention in the act of *voluntary* conveyances, and the question has always been, whether in the transaction there has been fraud or covin. Here were creditors at the time, and this has been said to have always been considered as a badge of fraud. It is true, that this circumstance is always strong evidence of fraud, but if there are other circumstances in the case, that alone will not be sufficient. Here the two families are settling their estates, upon a marriage, and making provision for future prospects. One estate is limited to the intended husband in fee; the other, amongst other limitations, is settled on the defendant Hannah, the wife of the settlor, for life, upon the event of her surviving her husband. This provision for her is taken out of the estate settled upon the rest of the family, so that if that had not been done the creditors would not have been the better for it; for she would have had her dower, and the rest would have been the estate of the married couple and their issue; add to this that she joined in the act, by which the husband stipulated that the estate conveyed to the intended son-in-law in fee should be discharged of her dower.

1 Bridl. 417.

Eyre, Baron.—The 13th *Eliz.* is a wholesome law,

plainly penned, and I wonder how artificial reason could puzzle it; an artificial rule of construction has entangled Courts of justice, *viz.* that a voluntary conveyance of a person indebted at the time is to be deemed fraudulent. It was never yet held, that such conveyance subjected the parties to the penalties; yet the clauses are co-extensive. The words *without notice* in the proviso are not applicable to the *debt* of the party conveying, but to *covin*, *fraud*, or *collusion*. Suppose a man had sold for the purpose of paying debts, would not that have been a saving of the notice of covin? or on the other hand, if a man in expectation of a judgment against him, sold for a full consideration, yet for the purpose of defrauding the judgment creditor, surely this would be void against a purchaser with notice. The notice therefore is not notice of the *debt*, but of the *covin*, or *fraud*. Where a family settlement is conducted with fairness and propriety, though the consideration strictly considered does not extend to all, yet the Court revolts at the idea of its being void. Lord *Hale* in *Jenkins* v. *Keymis*, extends the consideration of marriage to the whole. Lord *Macclesfield* in *Osgood* v. *Strode*, thinks that will not do, and resorts to the idea of purchase. But this is in effect the same thing as is said by Lord *Hale*. So, great pains have been taken to get out of the rule upon the construction of the 27th *Eliz.* as in *Newstead* v. *Searle*; yet Lord *Hardwicke* seems afraid, and gives loose reasons, not founded in any real distinctions. Lord *Mansfield* saw this, and in *Doe* v. *Rutledge*, *Cowp.* 705, brings back the case to the true principles, and states *Newstead* v. *Searle*, as an illustration of the principle. The settlement is not void upon the first clause of the act, by being fraudulent and covinous, and therefore does not want the protection of the Court. Upon these principles it is clear, that this is a fair transaction. It is true no fine was levied by Hannah. What then? the contract was for a voidable security. What is that to the creditors? that is for the parties only to consider. Besides, the question, as observed by *Lord Chief Baron*, is immaterial to all except the parties; for

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if this bargain had not been made, she would have had her dower, and the others all the rest. Here is also, if necessary, sufficient consideration: 1st, from her dower, given up for an equivalent, and certainly the Court will not weigh nicely the value of the equivalent: 2dly, there is a consideration also from the son-in-law's father, who settles one of his own estates by the same instrument. As to evidence of the grounds of the contract, that is unnecessary. This is properly treated by *Lord Chief Justice Wilmot*, in *Roe* v. *Mitton*. The truth is, that when something was given up by the parties, that must necessarily extend to all the limitations; where marriage only is considered, they may be fairly and naturally restrained; therefore on the general nature of the case, and the true construction of the act, I think the bill as to the real estate should be dismissed.

Perryn, Baron, declared himself of the same opinion.

The personal estate unapplied being of no value, the bill was wholly dismissed.

In Linc. Inn Hall, Lord Chancellor. Dec. 19, 1786.

FORD *versus* COMPTON.

After a decree for a specific performance of an agreement for a lease, and the lease had been executed in pursuance of such decree, the plaintiff brought an action at law to recover from defendant damages for the delay in the per-

A bill having been filed for a specific performance of an agreement, the plaintiff had a decree for the defendant to perform the agreement by executing a lease, &c. all which had been complied with; and nothing remained to be done under the decree. Afterwards the plaintiff brought an action at law against the defendant, to recover damages sustained by the plaintiff from the delay of performance of the agreement, and thereupon the defendant moved in the *original* cause for an injunction.

The *Lord Chancellor* thought that the motion could not be made in this cause, the decree having been completely carried into execution, and the cause therefore out of Court; but added there was no doubt of the defendant

being entitled to relief if he applied in a new cause; for that the plaintiff must make his election, either to have a specific performance in this Court, or damages at law, for the breach of the contract, and shall not have both.

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formance of that agreement. Although the defendant would have been clearly entitled to an injunction in a *new* suit, yet the decree having been wholly *executed*, the Court cannot make such an order in the *original* cause.

EX PARTE BELLETT.

At the Rolls, Sir Lloyd Kenyon. Dec. 20, 1786.

A writ *de ventre inspiciendo* may be had by a devisee as well as by an heir at law. A writ *de ventre inspiciendo* is always applied for by petition.

This was the petition of Mary Bellett and Anne Perry Manley for a writ *de ventre inspiciendo* to examine the widow of James Baron.

The petitioner Mary Bellett was sister and one of the co-heirs of James Baron, who by his will devised his real estate to trustees to pay debts, and for that purpose to apply the rents, &c. and, subject to the debts, to his own issue (if he should have any) in manner therein mentioned, and in default of issue, to the petitioner Mary Bellet for life, and then to her children with remainders over.

Ann Perry Manly claimed as tenant for life under a settlement made by her grandfather, who was devisee of the devisee of a remainder-man in fee expectant on the death of James Baron without issue.

On the 14th April 1786, James Baron married his maid servant, who in three weeks after the marriage was brought to bed of a dead child.

James Baron died in August 1786, and the widow alledging herself to be again with child, the present petition was preferred to the *Master of the Rolls*.

Madocks and *Richards* for the widow, objected to the writ being granted, for that the petitioners were not in a

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situation which entitled them to call for it; the writ can only be had by those who claim by *descent*; *purchasers* are not entitled. Now, in this case one of the petitioners is no kind of relation to the testator, and does not claim through, from, or under him: with respect to Mary Bellet the other petitioner, she happens to be one of his co-heirs, but here she only claims as tenant for life in equity under the will, not having even the legal estate in her. This application is not to the Court as a court of equity, but as *officina brevium*. The writ itself imports to be a remedy given to an *heir*: so all the comments on it in *Co. Lit.* 8. *b*, apply only to persons taking by descent: So *Cro. Eliz. Willoughby's* case, and *Cro. Jac.* 585. So *exparte Ayscough*, 2 *P. W.* 591. So in *exparte Bateman*, at the Rolls in Term 1784, the person who made the application claimed by descent. But in this case the petitioners claim all by purchase, though one of them happens to be one of the two co-heirs.

Scott and *Mitford*, *e contra*.—With respect to the interest of the petitioners, though they certainly claim by purchase, yet they are well entitled to the benefit of this writ. As far as the *civil law* has been adopted in this case by our law, it is to be observed, that in the civil law the word "*hæres*" applied just as much to a person claiming by purchase as by descent; he might be *hæres natus* or *hæres factus*: but in truth when first this writ was in use, it was sufficient to protect all real property; for then there was no power of devising, and therefore it was not adapted to any other case; but since such different alienations of property have been admitted, this writ must be accommodated to the exigency of the cases. So formerly estates could not be entailed, and yet that was not any objection in *exparte Ayscough* 2 *P. W.* which evidently proceeded on the more general ground of the party applying having the beneficial interest; but the case of *Attorney General* v. *La Roche*, cited in *exparte Ayscough* is decidedly the case of a purchaser, as the case of *exparte Bateman* will also appear to be upon examination.

Something was also said at the close of the argument respecting the propriety of filing a bill in order to ground an application of this nature. *Ex parte Bellett.*

Master of the Rolls.—As to the propriety of filing a bill in this case, I believe I have a collection of all the applications that have been made on this subject, and I do not find a single instance of the writ being applied for, but upon petition. The objection made by the widow is, that the petitioners claim by purchase and not by descent. At the time when the writ was first framed, which was coeval with the common law, the nature of the property now claimed could not possibly exist; there were no dispositions by will; and it is equally clear that the entails did not exist before the statute *de donis conditionalibus*, and estates for life were very unfrequent. The officers of the Court were not very nice in framing the writ, but they made use of a few compendious words, which were adapted to the exigence of the case. Now what is the exigence of this case? that the person entitled to the property should not be defeated by a supposititious child; the word disinherison or *exhæredatio* is not confined strictly to an heir. So in a writ of waste, though that writ expressed the thing to be done in disinherison, &c. Then the question is, whether in this case there are circumstances sufficient to warrant me in making the order. The situation and conduct of the wife were certainly sufficient to alarm the parties interested; she was brought to bed in less than three weeks after the marriage. This circumstance entitled her to no favour, but naturally induced the family to look upon her with suspicious eyes: without travelling into the several contradictory facts in the affidavits, it appears that shortly after the death of the husband doubts arose; and the wife did not take proper measures to remove these doubts, which she should have done, if it were only for the sake of the child. It cannot but be observed, that the person most competent to make an affidavit on this occasion (the man midwife) has not been brought to give any testimony. On the circumstances of this case, therefore, I think

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clearly I ought to grant the writ. But can I do it? it is said not, for that it is only to be granted to an heir at law; but there is no case to this, the language made use of in the writ applies *ad ea quæ frequentius occurrunt;* but where there is *eadem ratio*, there should be *eadem lex*. The case of *Attorney-General* v. *La Roche* must have proceeded on this principle; and so *exparte Ayscough*. The case of *Master Holford* and his *Lady* was a claim under a settlement; and the writ was granted after much opposition. The Court will therefore adapt the remedy to the exigence of the case. Nothing is clearer than that the Court of Exchequer cannot grant a writ of *Ne exeat regno;* but having become what it is, the Court grants an order in the nature of a *Ne exeat regno*, that the party should give security. I will not rest upon *Ex parte Bateman*, as it is a decision of my own; but I do rely upon the silence of the counsel in that case, who produced no precedent to this point. I am therefore very clearly of opinion, that I ought to grant the writ, or something equivalent to it: if the parties will agree to the terms of the order, I will accommodate them to humanity as far as I can with prudence.

But no terms being proposed, his Honour directed the writ to issue, which accordingly issued and was executed.—*Reg. Lib. A.* 1786, *fol.* 109, by the name of *Ex parte Baron.*

In Lincoln's Inn Hall, Lord Chancellor. Dec. 23, 1786.

EX PARTE HILL.

PETITION IN BANKRUPTCY.

A. on marriage executed a bond to trustees for payment of 1000*l.* within

A bond entered into by Thomas Archer dated the 17th of Nov. 1777, and mentioned to be made in contemplation of marriage, in the penal sum of 2000*l.* was conditioned to pay to the obligee therein named the sum of 1000*l.* within

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three months after his death in trust for the wife and issue of the marriage in the events therein mentioned, with a proviso that if A. should become insolvent or bankrupt, and the wife, or any of the issue should be then living, the trustees should be at liberty immediately to claim, and should be creditors for the sum of 1000l. and receive dividends rateably with the other creditors of A. to be applied solely to the use of the wife and children. A. become bankrupt. This is not a debt which can be proved under the commission.

three months after the death of the obligor upon trust for the wife and issue of the intended marriage in the several events and upon the several trusts and contingencies mentioned in the bond, (but which were not mentioned in the petition), after which came the following proviso, "provided always and it is the true intent and meaning of the parties hereto, and it is hereby expressly agreed between them, that in case the said Thomas Archer by losses or misfortunes in trade, or by any other ways or means whatsoever, shall during his natural life happen to fail or become insolvent or bankrupt, and she the said Mary or any of the issue of the said intended marriage shall be then living, then and in such case these presents shall operate and extend and be in force so as to enable, entitle, and give a right and power to the said obligees immediately, or at any time or times from and after such failure, insolvency, or bankruptcy to claim, come in, and be considered as lawful creditors for the said sum of 1000*l.* hereby intended to be secured, and to have, recover, and receive an equal share and dividend of the said estate and effects of the said Thomas Archer for the said sum of 1000*l.* rateably and proportionably with his other creditors, and in such case the said Thomas Archer and his assignees or creditors shall not be entitled to such dividend or dividends, or any subsequent interest or profit to arise thereform during the life of Thomas Archer; but in such case the said dividends when so recovered or received by the said obligees, shall be by the said obligees or the survivor of them, &c. put out at interest and applied for the use and benefit of the wife and children in manner therein mentioned."

Thomas Archer having become bankrupt, the obligees in the bond now petitioned to be admitted creditors for the said sum of 1000*l.*

The objection was, that this was a contingent debt, and the contingency had not happened at the time of the bankruptcy; that it was most clearly so, independent of the proviso, for then it depended on the wife or children

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surviving the husband; and that the provisd made no difference, for it could have no effect, until the husband had become bankrupt, and was therefore within the common rule.

Scott and *Spranger*, on the other hand, contended, that here were two events, on which the bond might become due, viz. insolvency and bankruptcy. Now a man may certainly become insolvent, before he becomes bankrupt; and it seems, that if Thomas Archer, instead of being bankrupt, had called together his creditors, in order to come to a composition with them, this bond must have been considered as a debt. But considering it as depending on the bankruptcy only, the bond became forfeit *eodem instante* with the bankruptcy; and in that case the debt may be proved under the commission, *Lockyer* v. *Savage*, 2 *Stra.* 947, 3 *Wils.* 284, and was so held in *Ex parte Parsons* before Lord *Camden* in 1767. But

The *Lord Chancellor* was of opinion, that this was a case of a debt, which did not accrue until after the bankruptcy, and that the proviso did not alter it; that, in the cases cited, an estate was created, and limitations declared upon it to endure until the party should become bankrupt; but here the debt is to arise from and after the bankruptcy.—The petition must be dismissed.

In Lincoln's Inn Hall, Lord Chancellor. Jan. 19, 1787.

HARFORD *versus* BROWNING.

PETITION IN CAUSE.

Testator appointed four executors, and gave to each of them, who should prove his will and take upon themselves the execution

The late Lord Baltimore by his will of the 4th of March 1771, charged his lands in Maryland (amongst other things) with annuities therein mentioned (that is to say), he hereby gave and bequeathed to Sir Robert Eden, Hugh Hammersley, Robert Morris, and Peter Prevost, his executors, who should prove that his will, and take upon themselves the administration thereof, the yearly sum of

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100*l.* over and above all deductions, to be issuing out of the said premises only, and during possession thereof, and payable to him so proving the said will, and taking upon him the execution thereof during his natural life as therein mentioned, over and above all other provisions made for his said executors or any of them by that will. He then proceeded to limit the premises in Maryland to the plaintiff Henry Harford in tail, remainder to the heirs male of the body of the plaintiff Frances Mary (then) Harford, in tail with remainder over; and the said testator (among other legacies) gave to the plaintiff Frances Mary Harford 30,000*l.* and to the said Sir Robert Eden, Hugh Hammersley, Robert Morris, and Peter Prevost, whom he thereby appointed executors of his said will, (that is to say) *to such of them as should prove that his will, and take upon him or them the execution thereof*, the sum of 1500*l.* over and above the annuities secured to them in that his will, to be paid out of his personal estate *upon their proving his will*, with interest till paid at 5 per cent. per annum; and in case any of his executors should die before him, or refuse to prove that his will for the space of six months after his decease, then he willed that the legacy or legacies given to the executors or administrators so dying or refusing to prove his will, should be divided equally amongst his other executors who should prove the said will as aforesaid, over and above all other provisions made for him or them respectively. And the testator gave all the residue of his personal estate to his said executors, in trust to place out the same on government or real securities at their discretion; and in case the plaintiff Henry Harford should live to attain the age of 21 years, then in trust when he should attain such age to pay and transfer all such residuary personal estate, &c. to the said plaintiff; but if said plaintiff should die under that age, then in trust for the said other plaintiff Frances Mary Harford. And the said testator thereby made it his earnest request to his executors, that they would superintend and take upon them the care of the persons and fortune of the said Henry Har-

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thereof, a legacy of 1500*l.* and an annuity of 100*l.* All the executors proved the will, and soon afterwards a bill was filed to carry the trusts of it into execution. After this M. one of the executors ran away with the infant daughter of the testator from a *boarding* school, and went through a ceremony of marriage with her in foreign parts, which marriage was afterwards declared null in the Spiritual Courts. Although M. did prove the will; yet as he did not appear to have done it with an intention of really acting in the execution of it, he is not entitled to his legacy.

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ford and Frances Mary Harford. All the executors proved the will.

In Easter Term 1772 plaintiffs filed their bill against the executors, praying directions for carrying the said will into execution, and that the plaintiff might have the care and protection of this Court to their persons and estates.

On the 5th May 1772, Robert Morris one of the executors contrived to carry away the plaintiff Frances Mary Harford, then only between twelve and thirteen years of age, from the boarding school at which the executors had placed her, and took her abroad, where he went through the form of a celebration of marriage with her two several times; and they continued abroad some time.

In the mean time the other executors applied by petition to the then *Lord Chancellor*, setting forth this behaviour and conduct of the said Robert Morris, whereupon his Lordship, on the 20th of May 1772, ordered that the said Robert Morris and Frances Mary Harford should personally attend his Lordship on the 16th of June then next, on the matter of the said petition, and they were in the meantime restrained from intermarrying with each other.

On the 8th of July 1772, Hammersley and Prevost preferred another petition to the *Lord Chancellor*, setting forth that they had received intelligence that the said Robert Morris had proceeded with the said Frances Mary Harford into some parts of Flanders, where he had endeavoured to compass a marriage with her, and from thence had further proceeded with her to the city of Hamburgh, where he had detained her under some pretence of a marriage had with her, and also stating some circumstance of misconduct in the said Robert Morris, with respect to the said Henry Harford, and praying his Lordship's directions. Whereupon his Lordship ordered that the said Robert Morris should personally appear before his Lordship, and should produce the said Frances Mary Harford on the 5th day of August then next.

On the 5th of August 1772 these petitions came on again,

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when it appearing by evidence laid before the Court, that the said Robert Morris had on the 21st day of May 1772 compassed the celebration of a pretended marriage with the said Frances Mary Harford at Ypres, in Austrian Flanders, and had carried her from thence to some place near Hamburgh, his Lordship ordered that the said Robert Morris should be restrained from acting in the execution of the trusts of the said will, and from any further interference in the care of the persons and fortunes of the said Henry Harford and Frances Mary Harford until further order, and that the said Robert Morris should stand committed to the Fleet for his contempt in not producing the person of the said Frances Mary Harford, who was sworn to be in his custody or power, and that the said former order for restraining the said Robert Morris from intermarrying with the said Frances Mary Harford should be continued.

On the 5th of January 1773 Robert Morris celebrated a second marriage with the said Frances Mary Harford at Ahrensburgh in the Duchy of Holstein.

All the defendants except Morris (who continued abroad) answered the bill, and the cause came on to be heard on the 8th day of July 1774, when his Lordship declared the testator's will well proved, and referred it to the Master to take an account of the testator's debts, legacies, and funeral expenses, and (amongst other things) declared that the defendants, the executors who had proved the said testator's will, were each of them entitled to a legacy of 1500*l.* but in regard to the said Robert Morris, who was proved to be abroad, it was ordered that the payment of his legacy of 1500*l.* should be staid until further order of the Court, and directed the clear residue of the personal estate to be paid into the bank for the benefit of the said Henry Harford, when he should attain 21, &c.

Henry Harford having attained 21 years of age, applied for the clear residue of the personal estate to be paid to him, which was accordingly done, but a sum of 3913*l.* 3 per cent. annuities was set apart to answer the claim of Robert Morris for the principal and interest of his said

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legacy, and was carried to a separate account of "the claim of Robert Morris, Esquire."

In 1778 Robert Morris filed a bill for the annuity of 100*l.* and the legacy of 1500*l.* and interest, to which the defendants put in answers, stating the several circumstances of Mr. Morris's conduct and examined witnesses; and this cause coming on to be heard in February 1783, the bill was dismissed with costs.

A suit of nullity of marriage having been instituted in the Court of Arches against the said Robert Morris, and brought by appeal before the delegates, the two marriages were declared null and void to all intents and purposes.

The plaintiff Henry Harford now preferred a petition stating these several facts, and insisting that the said Robert Morris, by withdrawing himself from the kingdom so soon after he had proved the said testator's will, did voluntarily incapacitate himself from acting in the execution of the trusts thereof, and consequently did not entitle himself to the said legacy or annuity; or that if he ever was entitled thereto, he the said Robert Morris by grossly abusing and violating the trust reposed in him by the said testator in the several instances above-mentioned, had absolutely forfeited and lost all right to the said testator's bounty, and that the said legacy of 1500*l.* ought to be considered as sunk into the residue of the said testator's personal estate, and praying that the sum of 3913*l.* 3 per cent. annuities which had been appropriated to the claim of Robert Morris might be transferred to the said plaintiff.

This petition had come on before the *Lord Chancellor* on a former day, when his Lordship intimated his opinion, that from the evidence laid before the Court, it sufficiently appeared that though Mr. Morris had proved the will, yet that he did not prove it with any intention to perform the trusts thereof; that it was impossible for Mr. Morris to support his claim to this legacy by the mere fact of proving the will, for though the words of the will might

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be sufficient, to entitle an executor to his legacy who proved the will, but was prevented by some accident from acting in the trusts of it, yet it must appear that he proved it with an intention to act in it, which in this case Mr. Morris did not appear to have done; that on the whole Mr. Morris had made use of the circumstance of his having proved the will as a means of enabling him to violate in the grossest manner the trust reposed in him by the testator. And his Lordship therefore directed the petition to stand over, and desired *Mr. Scott*, who was employed by Mr. Morris, to consider the evidence in the meantime, and to see whether it was possible to contend that Mr. Morris was entitled to the legacy under these circumstances. And the petition standing again in the paper on this day, *Mr. Scott* said, he thought it impossible to argue, that Mr. Morris was entitled to the legacy; but suggested a doubt, whether this point could be properly decided against Mr. Morris in this manner, and whether the grounds of the determination of the Court would sufficiently appear upon record, Mr. Morris having been abroad at the time the cause was heard, and never having in fact been made a party thereto. The *Lord Chancellor*, after some consideration, declared his opinion, that if Mr. Morris had not been personally served, and had not now appeared, he should have ordered the petition to stand over, that Mr. Morris might be personally served; but *Mr. Scott* having instructions to appear for him, his Lordship thought that upon his appearance, and reading the several proceedings in the cause instituted by Morris for his legacy as aforesaid, the order would be proper; and made the order accordingly.

In Linc. Inn Hall, Lord Chancellor. Jan. 22, 1787.

EXPARTE WILSON.

PETITION IN BANKRUPTCY.

On petitons in bankruptcy to be admitted to prove debts, which have been rejected by the Commissioners, the petitioners ought to state to the Court in the first instance the grounds of of the Commissioners' objection.

In this case the *Lord Chancellor* said, he very much disapproved of the practice of persons who petition to be at liberty to prove debts under commissions of bankruptcy by way of appeal from the decisions of the Commissioners, coming into the Court with only a general affidavit of their debt, without entering into the objections made by the Commissioners, which had the effect of throwing it on the other to make their objections *de novo* here, and then the petition must stand over to give the petitioners an opportunity of answering the affidavits; whereas they always knew the grounds of objection, and might and ought to meet them. And his Lordship dismissed the present petition for this reason.

In Linc. Inn Hall, Lord Chancellor. Jan. 22, 1787.

EXPARTE WOODMASON.

PETITION IN BANKRUPTCY.

A commission of bankrupt against A. describing him to be partner with B. is a separate commission.

A commission against *A.* therein described to *be partner of B.* whereupon the Commissioners objected to permitting the separate creditors to prove their debts without an order; but *Lord Chancellor* declared this to be no bar to the separate creditors proving their debts, for it was to be taken as a separate commission; and considered this as an established point; but his Lordship confined the order to the petitioners, and would not extend it to the *other* separate creditors, though the petition was on the behalf of the petitioners and other separate creditors.

EXPARTE WORRALL.

In Court, Lord Chancellor. Jan. 27, 1787.

PETITION OF BANKRUPTCY.

A creditor on a bill of exchange made affidavit of a debt of 2500*l.* which proof was admitted for only 1200*l.* and the residue was claimed. It appeared afterwards that the creditor was entitled to prove the whole against the bankrupt, but in the meantime he had received 500*l.* from some other party to the bill. The former affidavit cannot now be received as a proof of the remainder of the debt, but new proof must be made, and 500*l.* having been actually paid to the creditor he can only prove the residue after deducting the 500*l.*

In this case the petitioner was a creditor of the bankrupt for 2500*l.* as a security for which he held a bill of exchange for 5000*l.* on which the bankrupt was liable as acceptor or indorser. Besides this bill of exchange, there was a sum of 1700*l.* in the hands of the petitioner, which was in dispute between the bankrupt and some other parties, and which the petitioner conceived to be an additional security to him as far as the bankrupt should appear to be interested therein. When the petitioner went before the Commissioners he swore to the debt, and that he had no security for the same, except the bill of exchange and the said sum of 1700*l.* and not being willing to give up his chance of the 1700*l.* the Commissioners admitted his claim only as far as the 1700*l.* and his proof as to the surplus. It afterwards turned out, that the bankrupt had no right to the 1700*l.* which consequently the petitioner could not have the benefit of; but before the petitioner made any further application in the present bankruptcy, he received a dividend under the commission of some other indorser of the said bill of exchange to the amount of 500*l.* and upwards; and he now applied to the *Lord Chancellor*, that the affidavit made by him on the former occasion might, under these circumstances, be taken and admitted as a proof of the whole debt of 2500*l.* under this commission, since, if he made proof now, he must deduct the sum received under the other commission.

The *Lord Chancellor* said that if the petitioner had proved his debt before he received the other dividend, he might have proved the whole, but now he could only prove the residue; and that the old affidavit having been admitted as a proof only beyond the 1700*l.* could not now serve him, but new proof must be made.

EXPARTE DUBOIS.

PETITION IN BANKRUPTCY.

In Court, Lord Chancellor. Jan. 27, 1787.

A broker acting under a commission *del credere* paid money to the principal on a *loss* which happened *before* the bankruptcy of the underwriter, but the *payment* was not made until *after* the bankruptcy.

Quere. Whether this debt can be proved by the broker under the commission against the underwriter?

A trustee cannot prove a debt alone; the *cestui que trust* must join in the proof.

The petitioner was a broker, who having a commission *del credere* from his correspondents abroad, procured a policy to be underwritten by the bankrupt, which was filled up with the petitioner's name, the correspondent's not being named therein. A loss happened before the bankruptcy, but no money was paid by the broker on account of the loss until after the bankruptcy. The petition was that the broker might be at liberty to prove this debt under the commission against the underwriter.

Hardinge, for the petitioner, mentioned *Grove* v. *Dubois. Term. Rep. Hil.* 1786, as directly in point.

Mansfield and *Scott contrà*.—Dubois having a commission *del credere*, became a surety for the underwriter to the assured, and therefore certainly becomes liable to the assured immediately on the loss; but yet the broker is only the surety, and the underwriter the principal, although the creditor may take his remedy against which he pleases. Now the broker having had no money until after the bankruptcy, is in the common case of a surety who cannot prove any debt under the bankruptcy of the principal, if he has not been called upon before the bankruptcy. He cannot make himself a creditor by proving the policy under the commission, for the policy is satisfied by his payment; but by such payment a new debt accrues to the broker after the bankruptcy, which therefore cannot be proved. The case of *Grove* v. *Dubois* was determined on a distinct ground, that is, that the underwriter, being principally liable to the assured, but the broker being also bound, and having effects of the principal in his hands, he applies those effects in payment of the debt, and the Court thought it contrary to all equity to make him pay these over again, having in fact applied them in payment of a debt, for which the bankrupt was primarily liable: and so in the common

case of a surety, where the surety has in his hands money of the principal, and after the commission applies the money in payment of the debt for which he is surety, the assignees cannot recover it over in an action against him. But the present case is not a question of set off; but is merely a case of a surety paying money, and becoming a creditor after the bankruptcy. If it had been the case of a common broker there could have been no doubt: then the question is, what difference the commission *del credere* can make? Now the commission *del credere* is merely a contract between the broker and the assured, and the underwriter has nothing to do with it, and perhaps knows nothing of it; the broker comes to the underwriter as agent for persons abroad; then how can the contract between such agent and his principal (that is the assured) raise any contract between the broker and underwriter, or vary the rights as between them? Whatever effect therefore the commission *del credere* may have between the broker and assured, it seems very difficult to say why the broker stands in any different situation with the underwriter by reason of such commission, with which the underwriter had nothing to do. Suppose a bond given to *A.* in trust for *B.* and the obligor becomes bankrupt, if the trustee paid the debt to the *cestui trust* after the bankruptcy, he could not prove the debt under the obligor's commission.

Ex parte Dubois.

Lord Chancellor.—Let us consider the case put of the trustee. The reason why a trustee is not permitted to prove the debt *alone* under the commission is, that he must swear to the debt being due to him; now the debt being only due to *him in trust for* another, it is rather too great a refinement for him to take such an oath; and if he swear the debt is due to him as trustee only, that is not sufficient, for it does not appear with certainty that the debt has not been paid to the *cestui que trust*. The *cestui que trust* must therefore join the trustee in swearing that no part of the debt has been paid or secured. Now if the trustee would swear that he had absolutely undertaken to pay the money to the *cestui que trust*, would not that entitle him to prove the

Exparte Dubois.

debt? (a) Or suppose a trustee for an infant's money, had lent it out on a private security, and consequently was liable to the infant from the nature of the original contract, by which a trustee undertakes to take care of an infant's money, could not the trustee prove this debt under the commission of the person to whom he lent it? Has this circumstance any other effect than that of sinking the equity in the legal demand, and enabling the trustee to demand the money both in law and in equity: now if this be so on the bond, how will you distinguish the case of this policy? Dubois was the insured, that is, he was named in the policy, but in fact the contract was made for the benefit of others, who were not named in the policy (which might be until the late statute); he was therefore the trustee for the insured, with this circumstance attending, that he was under an absolute engagement to the *cestui que trusts;* he was insured really for himself, for he was liable to the *cestui que trusts* from the moment the contract was made; and therefore the debt incurred from the time of the loss. The commission *del credere*, as it seems to me at present, gave him a substantial interest from the time of the contract. But let this stand to the next day of petitions, that I may look more into the cases.

(a) This *Scott* denied, for still the *cestui que trust* might have been paid the debt.

In Court, Lord Chancellor. Feb. 1, 1787.

VAUGHAN *versus* LLOYD.

Witnesses examined in the cause shall not be again examined before the Master without leave of the Court.

Mansfield moved to suppress the depositions of several witnesses who had been examined before the Master. The objection to some of them was, that they had been before examined in the cause, and that according to the practice of the Court they could not be again examined before the Master, whether to the same point or not, without

an order of the Court for that purpose. And for this was cited *Sawyer* v. *Boyer*, 1 *Bro. Cha. Rep.* 388, and *Browning* v. *Barker*, cited in the former case, and *Prac. Reg.* 165. On the other side it was said, that the rule only extended to the examination of the *same* person on the *same* point, and never could be meant to include a witness who might be examined in the cause only to prove an exhibit, but in fact might be the most material witness upon the merits before the Master.

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It is not considered as a species of impertinence that many witnessess are examined to the same fact, provided the fact be material; but if it be admitted by the answer, and therefore *not in issue* in the cause, any depositions to this point would be deemed impertinent.

Another head of objection was, the examination of a vast number of witnesses to a point which had been fully established by other evidence in the cause, which was said to be a species of impertinence, for which the depositions might be referred, and if found so, would be suppressed.

Lord Chancellor.—The first question is, whether in any case a witness who has already been examined in the cause, can be again examined before the Master without leave of the Court had for that purpose; and this is a dry point of practice. Now if the witness has been examined only to trifling facts in the cause, or if in truth he knows more than he has already been examined to, it would most certainly be very hard to prevent the party from having the benefit of his testimony before the Master. But the question is, whether the Court has not taken the precaution of making it necessary for the party in that case to apply for leave of the Court? which leave the Court will certainly grant wherever the substantial justice of the case requires it, but will put the party under the terms of having the interrogatories, approved and settled by the Master, who in so doing will take care that the same witness is not a second time examined to the same facts, not only to prevent the parties being loaded with unnecessary expense, and the cause with useless depositions, but what is still a greater object, to avoid the danger of perjury, which would be incurred by a witness deposing a second time to the same fact, after having seen where the cause pinched, and how his testimony bore upon it. Let these depositions therefore be

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suppressed, and let the witnesses be examined again upon interrogatories to be settled by the Master; but I will not insert in the order any directions that they should not be examined on the same points, for that the Master will take care of. Such a direction was inserted in the order of *Browning* v. *Barker*, but I much doubt whether it was proper. Suppose the witness had been examined in the cause on a more general interrogatory, under which he might have deposed to the point required, but did not, and a more particular interrogatory was exhibited to get at his testimony, I should think the Master would do right in admitting it. This matter is therefore to be judged of by the Master, and if his judgment is erroneous, you may then come here to have it rectified.

On the other point, namely, that many witnesses have been unnecessarily examined to the same facts, I think it impossible to maintain the objection. I cannot invent any principle upon which I can do this. All that can be said is, that a man has been too anxious to prove a fact: I do not know that this has been treated as impertinence. If, indeed, a defendant had charged himself by his answer to the full amount sought by the bill, or if the suit was closed as to any particular fact by a plenary admission of the defendant, and after this the plaintiff thought proper to examine witnesses to this point so admitted, the depositions as to this point, I think, would be foreign and impertinent; and in that case I should send it to the Master to inquire whether the witnesses had been examined on any point *not in issue* in the cause; but in the present case it is not pretended, that it was not necessary to examine witnesses on the point, but it is said that too many witnesses have been examined. At any rate it is too much to set aside depositions on this ground for irregularity.

In Court, Lord Chancellor. Feb. 1, 1787.

FENTON *versus* LOWTHER.

A salary to an equerry to one of the Royal Family is not a subject of sequestration.

The defendant being indebted to plaintiff on a bond for 300*l.* lent and advanced to the defendant, the plaintiff put this bond in suit at law, and obtained judgment thereon, and sued out an elegit, to which the sheriff returned that the defendant had no lands, &c. The defendant being a Member of Parliament, the plaintiff filed a bill in this Court, to compel the defendant to discover his qualification and the title deeds, &c. relating thereto. The defendant having stood out all process of contempt for want of his answer, a commission of sequestration issued against him, but the sequestrators could find nothing to sequester; but the defendant being one of the Equerries of his Royal Highness the Duke of Gloucester, the plaintiff now moved that Dr. Duval, the treasurer of his Royal Highness, might be directed to pay the salary of the defendant (as Equerry) then in Dr. Duval's hands, to the sequestrators named in the said commission.

Mitford, for the plaintiff, endeavoured to put this income on the same footing with rents and profits, and like them to be liable to sequestration; but the *Lord Chancellor* considered this more like a debt, and asked what instances there had been of sequestring debts? *Mitford* mentioned one instance out of *Tothill*, but it was very shortly stated, and it did not appear whether the order was not made on a bill filed for this particular purpose.

And upon the whole his Lordship thought that this property was not subject to the sequestration, although it was strongly urged, that the plaintiff was left altogether without any means of enforcing an answer to his bill, as the defendant was privileged, and would probably lose his whole debt.

Clayton - Finch 15 Eq. 266

At the Rolls. Sir Lloyd Kenyon. Feb. 6, 1787.

TURNER *versus* OGDEN.

A bequest for preaching a sermon on Ascension day, for keeping the chimes of the church in repair, and for a payment to be made to the singers in the gallery of the church, are all bequests to charitable uses, within 43 *Eliz.*

Mark Neale by will bequeathed 20*s.* per annum to the curate of the parish of Oldham, for preaching a sermon on Ascension day: he also gave 5*l.* per annum to the clerk of the said parish to keep the chimes of the church in good repair, to play the 4th and 92d Psalms: and also gave 3*l.* per annum to be paid on Ascension day to the singers who sat in the gallery of the church, and he directed all these bequests to be paid out of the house in which he then lived, and to be continued as long as the lease lasted; and the house to be kept in good repair.

And the question was, whether these legacies, being made payable out of land, were not void by the 9th of *Geo. II.*

To shew them to be void *Scott* cited *Duroure* v. *Motteux*, 1 *Vez.* 320, and *Madocks*, in support of them mentioned *Grosvenor* v. *Hallam*, before Lord *Camden*, in 1767.

Master of the Rolls.—Many preliminary points relating to this question are fully settled. The statute undoubtedly extends to all interests out of leasehold premises. With great deference to Lord *Hardwicke*, if he really said what he is reported by *Vezey* to have said in *Duroure* v. *Motteux*, I cannot think he argued very soundly; for that the legislature meant to forbid all dispositions in mortmain, because it has forbidden dispositions to charities, does not appear to me to follow by any means; and yet when he says, that the charitable uses are the best, he must mean to distinguish them. All the statutes expressly mention dispositions to a charity; and if I were called upon to decide whether this extended to other dispositions, I should have considerable doubts, and should be more inclined to think with Lord *Camden*, in *Grosvenor* v *Hallam*, than with Lord *Hardwicke*, in *Duroure* v. *Motteux*. However, it is not necessary for me to decide that point at present; for

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my opinion is, that these are charitable uses. In statute 43 *Eliz.* there is a great enumeration of charitable uses. Now these, perhaps, are not strictly within them, but the statute does not affect to mention all. The repairs of the church are particularly taken notice of. Now keeping the chimes in tune may fairly come within the idea. And the singing psalms is part of the religious service, though, perhaps, not so useful as the sermon, which has been determined to be a charitable use; and, therefore, without disputing the authority of Lord *Hardwicke*, and yet without assenting to it, I am of opinion that all these bequests are void, as being dispositions out of land to charitable purposes.

TROTTER *versus* OSWALD.

At the Rolls. Sir Lloyd Kenyon. Feb. 6, 1787.

The Bishop of Raphoe in Ireland, by his will in July 1776, gave all the residue of his property whatsoever, both real and personal, in trust to the plaintiff Trotter, and to another trustee, "for the use of John Bogle during his life, and to the lawful heirs of his body after his demise, but in case of his dying without issue of his body, after his decease I give all such residue to John Oswald."

Testator gave the residue of his personal estate to trustees for the use of B. during his life, and to the lawful heirs of his body after his demise; but in case of his dying without issue of his body *after his decease*, "I give all such residue to O." This creates a contingency with a double aspect, and in the event of B. leaving no child, the limitation to O is good.

The question was, whether the limitation to John Oswald was or was not too remote.

Pinbury v. *Elkin*, 1 *P. W.* 563, and *Theebridge* v. *Kilburne*, 2 *Vez.* 233, were cited.

Master of the Rolls.—In general, words which give an estate tail in land, give the absolute property in personal estate, and a limitation over of personalty, after an indefinite failure of issue, is clearly void; but if the failure of issue is limited within a certain bound prescribed by law, then such limitation is allowed. The questions therefore on this subject, are questions of construction, *viz.* whether, according to the fair construction of the words, such limits are transgressed. In this case I think a doubt can scarcely be framed. The residue is first given to

Parker v Brooks 1 Kay & J. 163.
Hodges v Harpur 3 Sel. & J. 139.

v.
Oswald.

Bogle and the lawful heirs of his body; if the will had stopped here, it would most clearly have given him the absolute property; so, if it had rested on the words, "if he die without issue;" but the important words follow, viz. "after his decease I give," &c. These make it a contingency with a double aspect; if he had a child at his death, then the limitation over would be at an end; but if not, the limitation over is within legal limits. This was therefore a good limitation in its creation. The event which may give it effect, or destroy it, is still in the womb of time; and therefore at present no direction can be given.

In the Exchequer. Lord Chief Baron Eyre, Baron Hotham.
Feb. 8, 1787.

The doctrine of contribution amongst sureties is not founded in contract, but is the result of general equity on the ground of equality of burthen and benefit. Therefore where three sureties are bound by *different instruments*, but for the same principal and the same engagement, they shall contribute.

DERING *versus* EARL OF WINCHELSEA.

Thomas Dering Esq. having been appointed collector of some of the duties belonging to the customs, it became necessary upon such appointment for him to enter into bonds to the Crown with three securities for the due performance of this office. Sir Edward Dering his brother, the Earl of Winchelsea, and Sir John Rous, having agreed to become sureties for him, a joint and several bond was executed by Thomas Dering and Sir Edward Dering to the Crown in the penalty of 4000*l.*, another joint and several bond by Thomas Dering and the Earl of Winchelsea, and a third by Thomas Dering and Sir John Rous in the same penalty of 4000*l.* all conditioned alike for the due performance of Thomas Dering's duty as collector. Mr. Dering being in arrear to the Crown to the amount of 3888*l.* 14*s.* the Crown put the first bond in suit against Sir Edward Dering, and judgment was obtained thereon for that sum: whereupon Sir Edward filed this bill against the Earl of Winchelsea and Sir John Rous, claiming from them a contribution towards the sum so recovered against him.

Dering v. Earl of Winchelsea.

The cause had been argued at length, in Michaelmas Term last, and now stood for judgment.

Lord Chief Baron.—This bill is brought by one surety against his two co-sureties, under the circumstances (above mentioned.) Mr. Dering's appointment, the three bonds, and the judgment against the plaintiff, are in proof in the cause; the original balance due, and the present state of it, are admitted. The demand is resisted on two grounds: 1st, that there is no foundation for the demand in the nature of the contract: and 2dly, that the conduct of Sir Edward Dering has been such as to disable him from claiming the benefit of the contract, though it did otherwise exist. There is also a formal objection which I shall take notice of hereafter. I shall consider the second ground of objection first, in order to lay it out of the case. The misconduct imputed to Sir Edward is, that he encouraged his brother in gaming and other irregularities; that he knew his brother had no fortune of his own, and must necessarily be making use of the public money, and that Sir Edward was privy to his brother's breaking the orders of the Lords of the Treasury, to keep the money in a particular box, and in a particular manner, &c. This may all be true, and such a representation of Sir Edward's conduct certainly places him in a bad point of view; and perhaps it is not a very decorous proceeding in Sir Edward to come into this Court under these cirumstances: he might possibly have involved his brother in some measure, but yet it is not made out to the satisfaction of the Court, that these facts will constitute a defence. It is argued that the author of the loss shall not have the benefit of a contribution; but no cases have been cited to this point, nor any principle which applies to this case. It is not laying down any principle to say that his ill conduct disables him from having any relief in this Court. If this can be founded on any principle, it must be, that a man must come into a Court of Equity with clean hands; but when this is said, it does not mean a general depravity; it must have an immediate and necessary relation to the equity sued for;

Dering v. *Earl of Winchelsea.*

it must be a depravity in a legal as well as in a moral sense. In a moral sense, the companion, and perhaps the conductor, of Mr. Dering, may be said to be the author of the loss, but to legal purposes, Mr. Dering himself is the author of it; and if the evil example of Sir Edward led him on, this is not what the Court can take cognizance of. Cases indeed might be put in which the proposition would be true. If a contribution were demanded from a ship and cargo for goods thrown overboard to save the ship, if the plaintiff had actually bored a hole in the ship, he would in that case be certainly the author of the loss, and would not be entitled to any contribution. But speaking of the author of the loss is a mere figure of speech as applied to Sir Edward Dering in this case. The real point is whether a contribution can be demanded between the obligors of distinct and separate obligations under the circumstances of this case. It is admitted that if there had been only one bond in which the three sureties had joined for 12,000*l.* there must have been a contribution amongst them to the extent of any loss sustained; but it is said, that that case proceeds on the contract and privity subsisting amongst the sureties, which this case excludes; that this case admits of the supposition that the three sureties are perfect strangers to each other, and each of them might be ignorant of the other sureties, and that it would be strange to imply any contract as amongst the sureties in this situation; that these are perfectly distinct undertakings without connection with each other, and it is added, that the contribution can never be *eodem modo*, as in the three joining in one bond for 12,000*l.* for there, if one of them become insolvent, the two others would be liable to contribute in moieties to the amount of 6000*l.* each, whereas here it is impossible to make them contribute beyond the penalty of the bond. *Mr. Madocks* has stated what is decisive, if true, that nobody is liable to contribute who does not appear on the face of the bond; if this means only that there is no contract, then it comes back to the question, whether the right of contribution is founded on contract.

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If we take a view of the cases both in law and equity, we shall find that contribution is bottomed and fixed on general principles of justice, and does not spring from contract; though contract may qualify it, as in *Swain* v. *Wall.* 1 *Cha. Rep.* 149. In the *Register*, 176. *b.* there are two writs of contribution, one *inter co-hæredes*, the other *inter-cofeoffatos;* these are founded on the statute of *Marlbridge;* the great object of the statute is to protect the inheritance from more suits than are necessary. Though contribution is a part of the provision of the statute, yet in *Fitz. N. B.* 338, there is a writ of contribution at common law amongst tenants in common, as for a mill falling to decay. In the same page *Fitzherbert* takes notice of contribution between co-heirs and co-feoffees, and as between co-feoffees he supposes there shall be no contribution without an agreement, and the words of the writ countenance such an idea, for the words are "*ex eorum assensu*," and yet this seems to contravene the express provision of the statute: as to co-heirs the statute is express; it does not say so as to feoffees, but it gives contribution in the same manner. In *Sir William Harbert's* case, 3 *Co.* 11. *b*, many cases of contribution are put; and the reason given in the books is, that in *equali jure* the law requires equality; one shall not bear the burthen in ease of the rest, and the law is grounded in great equity. *Contract* is never mentioned. Now the doctrine of equality operates more effectually in this Court, than in a Court of law. The difficuty in *Coke's Cases* was how to make them contribute; they were put to their *auditâ querelâ*, or *scire facias*. In equity there is a string of cases in 1 *Eq. Ca. abr. tit.* "Contribution and average." Another case occurs in *Harg. Law Tracts* on the right of the King on the prisage of wine. The King is entitled to one ton before the mast, and one ton behind, and in that case a right of contribution accrues; for the King may take by his prerogative any two tons of wine he thinks fit, by which one man might suffer solely; but the contribution is given of course on general principles which govern all these cases. Now to come to the particular case of sureties; it is clear that one surety may

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compel a contribution from another, towards payment of a debt to which they are jointly bound. On what principle? Can it be necessary to resort to the circumstance of a joint bond? What, if they are jointly and severally bound? What difference will it make if they are severally bound, and by *different* instruments, but for the *same* principal, and the *same* engagement? In all these cases the sureties have a common interest, and a common burthen; they are joined by the common end and purpose of their several obligations, as much as if they were joined in one instrument, with this difference only, that the penalties will ascertain the proportion in which they are to contribute, whereas if they had joined in one bond, it must have depended on other circumstances. In this case the three sureties are all bound that Mr. Dering shall account for the monies he receives; this is a common burthen; all the bonds are forfeited at law; and in this Court, as far as the balance due; the balance might have been so great as to have exhausted all the penalties, and then the obligee forces them all to pay; but here the balance is something less than one of the penalties. Now who ought to pay this? the one who is sued must pay it to the Crown, as in the case of prisage, but, as between themselves, there shall be a contribution, for they are in *equali jure*. This is carried a great way, where they are joined in one obligation, for if one should pay the whole 12,000*l.* and the second were insolvent, the third shall contribute a moiety, though he certainly never meant to be liable for more than a third: this circumstance, and the possibility of one being liable for the whole, if the other two should prove insolvent, suggested the mode of entering into separate bonds; but this does not vary the reason for contribution, for there is the same principal and the same engagement; all are equally liable to the obligee to the extent of the penalty of the bonds when they are not all exhausted: if, as in the common case of a joint bond, no distinction is to be made, why shall not the same rule govern here? As in the case of average of cargo in a Court of law, *qui sentit commodum sentire debet et onus*. This principle has a direct applica-

tion here, for the charging one surety, discharges the other, and each therefore ought to contribute to the *onus*. In questions of average there is no contract or privity in ordinary cases, but it is the result of general justice from the equality of burthen and benefit: then there is no difficulty or absurdity in making a contribution take place in this case, if not founded on contract, nor any difficulty in adjusting the proportions in which they are to contribute; for the penalties will necessarily determine this.

The objection in point of form, which I before mentioned, is, that the bill cannot be sustained, inasmuch as it has not charged the insolvency of the principal debtor, and that such a charge is absolutely necessary. As a question of form, it ought to have been brought on by demurrer; but in substance the insolvency of Mr. Dering may be collected from the whole proceedings, which strongly imply it; for the plaintiff appears to have submitted to the judgment, and the defendants have made their defence on other grounds.

On the whole, therefore, we think that the plaintiff is entitled to the relief he prays, and declare that the balance due from Thomas Dering being admitted on all hands to amount to the sum of 3883*l.* 14*s.* 8½*d.* the plaintiff Sir Edward Dering, and the two defendants the Earl of Winchelsea and Sir John Rous ought to contribute in equal shares to the payment of that sum, and direct that the said plaintiff and defendants do pay in discharge thereof each of them the sum of 1294*l.* 11*s.* 7*d.* And that on payment thereof the *Attorney-General* shall acknowledge satisfaction on the record of the said judgment, and that the two bonds entered into by the Earl of Winchelsea and Sir John Rous, be delivered up to them respectively. But this not being a very favourable case to the plaintiff, and the equity he asks being doubtful, we do not think it a case for costs.

Green v Green 3 Ves. jr. 403. Harvey v Stacey 1 Drewry 118. Catlin v Brown 11 Hare 372. Re Seymour 6 L. Rep. Eq. 321 Sharp v St. Saviour 7 Ch. 343 Stuart v Cockerell 7 Eq. 366 Hearsum v Pearse 1 Eq. 535 Clark v Moseley 5 App. Cas. 727

At the Rolls. Sir Lloyd Kenyon. Feb. 14, 1787.

JEE *versus* AUDLEY.

Testator gave 1000*l.* to M. and the issue of her body, and in default of such issue he gave the said 1000*l.* to be equally divided between the daughters *then* living of J. and E. his wife. This devise takes in daughters of J. and E. born after the testator's death, and therefore the limitation is too remote.

Edward Audley, by his will, bequeathed as follows, "Also my will is that 1000*l.* shall be placed out at interest during the life of my wife, which interest I give "her during her life, and at her death I give the said "1000*l.* unto my niece Mary Hall and the issue of her "body lawfully begotten, and to be begotten, and *in* default "of such issue I give the said 1000*l.* to be equally divided "between the daughters *then* living of my kinsman John "Jee and his wife Elizabeth Jee."

It appeared that John Jee and Elizabeth Jee were living at the time of the death of the testator, had four daughters and no son, and were of a very advanced age. Mary Hall was unmarried and of the age of about 40; the wife was dead. The present bill was filed by the four daughters of John and Elizabeth Jee to have the 1000*l.* secured for their benefit upon the event of the said Mary Hall dying without leaving children. And the question was, whether the limitation to the daughters of John and Elizabeth Jee was not void as being too remote; and to prove it so, it was said that this was to take effect on a general failure of issue of Mary Hall; and though it was to the daughters of John and Elizabeth Jee, yet it was not confined to the daughters living at the death of the testator, and consequently it might extend to after-born daughters, in which case it would not be within the limit of a life or lives in being and 21 years afterwards, beyond which time an executory devise is void.

On the other side it was said, that though the late cases had decided that on a gift to children generally, such children as should be living at the time of the distribution of the fund should be let in, yet it would be very hard to adhere to such a rule of construction so rigidly, as to defeat the evident intention of the testator in this case, especially as there was no real possibility of John and Elizabeth Jee

having children after the testator's death, they being then 70 years old; that if there were two ways of construing words, that should be adopted which would give effect to the disposition made by the testator; that the cases, which had decided that after-born children should take, proceeded on the implied intention of the testator, and never meant to give an effect to words which would totally defeat such intention.

The cases mentioned were *Pleydell* v. *Pleydell*, 1 *P. W.* 748. *Forth* v. *Chapman*, 1 *P. W.* 663. *Lamb* v. *Archer* *Salk.* 225. *Rachel's* case cited 2 *Vern.* 60. *Smith* v. *Cleaver*, 2 *Vern.* 38, 59. *Pollex.* 38. *Atkinson* v. *Hutchinson*, 3 *P. W.* 258. *Wood* v. *Saunders*, *Pollex*, 35. *Hughes* v. *Sayer*, 1 *P. W.* 534. *Cook* v. *Cook*, 2 *Vern.* 545. *Horsley* v. *Chaloner*, 2 *Vez.* 83. *Coleman* v. *Seymour* 1 *Vez.* 209. *Ellison* v. *Airy*, 1 *Vez.* 111.

Master of the Rolls.—Several cases determined by Lord *Northington*, Lord *Camden*, and the present *Chancellor*, have settled that children born after the death of the testator shall take a share in these cases; the difference is, where there is an immediate devise, and where there is an interest in remainder: in the former case the children living at the testator's death only shall take: in the latter those who are living at the time the interest vests in possession; and this being now a settled principle, I shall not strain to serve an intention at the expense of removing the land marks of the law; it is of infinite importance to abide by decided cases, and perhaps more so on this subject than any other. The general principles which apply to this case are not disputed: the limitations of personal estate are void, unless they necessarily vest, if at all, within a life or lives in being and 21 years or 9 or 10 months afterwards. This has been sanctioned by the opinion of judges of all times, from the time of the Duke of Norfolk's case to the present; it is grown reverend by age, and is not now to be broken in upon; I am desired to do in this case something which I do not feel myself at liberty to do, namely to suppose it impossible for persons in so advanced an age as John and Elizabeth Jee to have children; but if this can be done in

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one case it may in an another, and it is a very dangerous experiment, and introductive of the greatest inconvenience to give a latitude to such sort of conjecture. Another thing pressed upon me, is to decide on the events which have happened; but I cannot do this without overturning very many cases. The single question before me is, not whether the limitations is good in the events which have happened, but whether it was good in its creation; and if it were not, I cannot make it so. Then must this limitation, if at all, *necessarily* take place within the limits prescribed by law? The words are "in default of such issue *I give* the said 1000*l.* to be equally divided between the daughters *then* living of John Jee and Elizabeth his wife." If it had been to "daughters now living," or "who should be living at the time of my death," it would have been very good; but as it stands, this limitation may take in after born daughters; this point is clearly settled by *Ellison* v. *Airey*, and the effect of law on such limitation cannot make any difference in construing such intention. If then this will extended to after-born daughters, is it within the rules of law? most certainly not, because John and Elizabeth Jee might have children born ten years after the testator's death, and then Mary Hall might die without issue 50 years afterwards; in which case it would evidently transgress the rules prescribed. I am of opinion therefore, though the testator might possibly mean to restrain the limitation to the children who should be living at the time of the death, I cannot, consistently with decided cases, construe it in such restrained sense, but must intend it to take in after-born children. This therefore not being within the rules of law, and as I cannot judge upon subsequent events, I think the limitation void. Therefore dismiss the bill, but without costs.

AYTON *versus* AYTON.

At the Rolls. Sir Lloyd Kenyon, Feb. 17, 1787.

RE-HEARING.

George Lee, by his will of the 10th of October 1762, "gave unto his wife Mary Lee, the whole rest, residue, and "remainder of all his stock, government securities, money, "and estates real and personal, for her life and no longer. "Upon her decease he gave and bequeathed them to the "children of Mr. John Ayton and his wife Jane, to be "equally divided amongst them the said Jane Ayton's "children, and not to any children by another marriage "of either party."

Testator gave the residue of his real and personal estate to his wife for life, and upon her decease he bequeathed it to the children of A. and his wife Jane to be equally divided amongst them the said Jane's children, and not to any children by any other marriage of either party.

At the time of the death of the testator and his widow Mary, the petitioners John and Susannah Ayton, were the only children of John and Jane Ayton, but after the death of the widow they had three more children, Hannah, Jane, and Elizabeth.

By the decree made in this cause by the *Master of the Rolls* on the 5th of December 1765, his Honour declared, that according to the words of the will, the testator meant to comprize not only such of the children of John and Jane Ayton as were living at the time of the making the will, and at the testator's death, but also all the children there should be of such marriage, and gave directions for applying the fund for benefit of the petitioners, "and any other child or children of the said John and Jane Ayton, as shall be living at the time of the death of Ayton and his wife, or either of them."

The residue is divisible amongst the children of A. and his wife, who were living at the death of the wife, but will not extend to children born after that time.

The petitioners now applied to have the cause reheard, complaining of the decree being erroneous in extending the construction of the words to children born after the death of the widow Mary Lee.

Scott, for the petitioners, insisted that the decree must be erroneous in this respect, though it would be right as to

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any children born after the death of the testator, but before the death of the tenant for life; that the time of the interest vesting in possession determined the objects in which it should vest; an immediate interest therefore given by will would vest in such children as were living at the time of the testator's death; where it is given in the shape of a remainder, it vests in such children as are living at the time the remainder falls into possession: this is fully decided by *Devisme* v. *Mellor*, before the *Lord Chancellor*, in July 1782.

Madocks on the other side argued, that this was a mere question of intention, for there was nothing illegal in giving it to the after-born children; but when the Court had nothing to guide them, they had laid down the rule as above mentioned, as being the most convenient; but here the intention of comprising all the children of John Ayton by Jane was collected by a very strong implication from the words which restrained it to the children of that marriage, "and not to any children by any other marriage of either party," which certainly implied that all the children of that marriage should take.

Master of the Rolls.—This certainly is a question of construction, viz. whether by the words the testator has made use of, he meant to comprize one class of children or another; but in this, as in many other cases, there are technical rules of construction, which are as binding on the Court as rules of law in other cases. The rule of construction applicable to the present case is settled, and settled most conveniently for the parties, by the case of *Ellison* v. *Airey*, 1 *Vez.* 111. So many children as come *in esse* before the time when the fund is distributable shall be comprehended, and no more; the vesting is not to be suspended till other children are born, to take away from the shares of the former. There are many other cases to this point. *Roberts* v. *Higham*, 12th July 1779. *Congrave* v. *Congrave*, March 1781, *Bartlett* v. *Lynch*, 26 May 1757. *Baldwin* v. *Karver*, January 1774, *Cowp.* 309. *Doug.* 503. *Isaacs* v. *Isaacs*, December 1768. *Devisme* v. *Mello*, July 1782.

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The general words will extend beyond children in being; for it will take in any child born before the remainder takes effect, and therefore so far I shall certainly go in this case; but the decree in 1765 goes further, and extends it to all the children of the marriage, which is a construction that would be attended with very great inconveniences; and I cannot see sufficient in the words confining the bequest to the children of the present marriage to break in upon the rule. I must therefore reverse the decree, and declare my opinion, that in the events which have happened the absolute interest in the residue vested in the children born before the death of Mary Lee, and not in the children born afterwards.

At the Rolls. Sir Lloyd Kenyon, Feb. 14, 1787.

SMALLMAN *versus* GOOLDEN.

Testator gave to his son "all sum and sums of money due to me, from him on bond or bonds or any other security." The son was indebted to testator by bond at the date of the will, and afterwards became indebted to him by another bond. The bequest does *not* include the subsequent bond.

The testator gave unto his son "all sum and sums of money due to me from him, on bond or bonds or any other security." After the making the will the son became indebted on bond for 100*l.* to the testator, being also indebted on bond before the will. The question was whether the subsequent bond was discharged by the bequest.

The *Master of the Rolls* said, he must suppose the testator meant to measure the bounty according to the situation at the time of making his will, and could not have in contemplation any future sums of money which the son might owe him; and therefore declared that the subsequent bond was not included in the bequest, but remained a debt to the testator's estate.—*Reg. Lib. B.* 1783, *fol.* 150. and 1786. *fol.* 357.

Douglas v. id 1 Ray 403.
Sidney v. id 17 Eq. 67
Courtt v. Courtt 7 Ch. D. 433

In Serjeant's Inn Hall. The Chief Baron Eyre, Barons Hotham, Perryn, Thompson. March 1, 1787.

POTTS *versus* BUTLER AND COWARD.

Where a verdict has been obtained at law and an injunction bill is filed while the plaintiff at law is out of the kingdom, and an injunction obtained against him for want of his answer, the Court will direct the plaintiff in equity to pay into Court the money recovered, and in default thereof will dissolve the injunction.

Motion that the injunction obtained in this cause might be dissolved, or that the plaintiff might pay the sum of 603*l.* 10*s.* recovered at law into Court.

On the 28th of May 1785, a charter-party was entered into between the plaintiff and the defendant Butler, whereby the plaintiff hired the ship called the Arethusa, and was to pay 195*l.* 10*s.* per month. By the charter-party Butler covenanted, that the ship should be provided with all things fit for such a ship and voyage, and should load and receive on board her as much goods and merchandize as could be stowed, leaving only room for passengers and provisions, and should use all diligence and dispatch in expediting the voyage. The ship sailed on her voyage to Jamaica, the defendant Coward being the captain, and arrived at Jamaica about the 3d of August 1785. She sailed from Jamaica about the end of January 1786, and arrived in England about the 19th of April following.

Butler brought an action against the plaintiff to recover the money due on the charter-party, upon which the plaintiff filed this bill, alleging that the ship was not properly fitted out, and that the captain delayed taking in a cargo unnecessarily, for the sake of getting more on the charter-party, and that the ship was not properly stowed, and did not bring home a full cargo, which he might have obtained; and that the witnesses, who could prove those facts, lived in Jamaica, so that he could not defend himself at law, if the action proceeded, and praying a discovery and a commission to examine his witnesses abroad, and an injunction.

The defendant Butler, at the time of filing the bill, was gone on a voyage to America, as captain of a ship. The plaintiff did not file his bill in time to obtain an injunction, until Butler had obtained an interlocutory judgment in his

action, and executed a writ of inquiry, on which he obtained 603*l.* 10*s.* damages and costs; after which the plaintiff upon affidavit of the facts above stated obtained an injunction.

Cooke now moved to dissolve that injunction, or that the money might be paid into Court. He cited *Sherwood* v. *White*, 1 *Bro. Cha. Rep.* 452. *Acton* v. *Market*, 2 *Bro. Cha. Rep.* 14. *Weshet* v. *Carnevalli* in Chancery, 9 July 1774. "This was a bill filed against an "Italian merchant for an injunction after verdict. A "motion was made upon an affidavit stating the falsehood "of the case made by the bill, and praying that the plain- "tiff might pay into Court the money recovered by the "verdict, or that the injunction might be dissolved, and "an order was made accordingly by Lord *Bathurst*." *Coglan* v. *Ragueneau* in Chancery, 10th July 1780. "The "defendants were Italian merchants resident at Leghorn, "and had obtained a verdict against the plaintiff for about "600*l.* in an action at law, to which the plaintiff had "pleaded a set off, which at the trial was admitted by the "defendants' agent, so that the verdict was only for the "difference; notwithstanding which the plaintiff now "filed his bill, alleging that the defendants had received "for their own use about 3000*l.* for the purchase of two "cargoes of fish sent by the plaintiff into the Mediteranean, "and that the plaintiff being unable to prove the circum- "stance at law, the verdict had therefore been obtained by "the defendants, although the balance was really due from "them to the plaintiffs. An injunction having been ob- "tained for want of an answer, an application was "now made to the Court on behalf of the defendants, "that the plaintiff might in a month pay into Court the "sum for which the defendants had obtained judgment at "law, or that the injunction might be dissolved. The "motion was supported by affidavit, shewing the impro- "bability of the case made by the bill, and particularly "stating, that the defendants' agents had admitted at the "trial all that the plaintiff had offered by way of set- "off. The motion was originally made before the *Master*

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" *of the Rolls* on the 30th of June; he doubted of the " propriety of the motion, and it stood over. And it was " moved before the *Lord Chancellor*, and the case of " *Weskett* v. *Carnevalli* was cited. *The Lord Chancellor* " observed, that bills of this nature, founded in falsehood, " were a disgrace to the justice of the nation; that the " Court of Exchequer had made a rule requiring an affi- " davit in support of the case made by the bill, whenever " an injunction was prayed, and the defendant out of the " kingdom; that this was a very unequal rule, as it ex- " tended to Scotland, Ireland, Calais, Ostend, places from " which an answer might be obtained almost as soon as " from a remote part of England; and he thought, that " upon a bill like the present filed against merchants resi- " dent in Leghorn, it was highly proper for the Court " to interfere. He therefore ordered the money to be paid " into the bank in a month, and in default of payment, the " injunction to be dissolved without further notice."

Scott, who was present, mentioned also the case of *Mitchell* v. *Davison* before the *Lord Chancellor*, lately, where the same thing was done. As to the merits *Cooke* stated affidavits, containing a full answer to what was alleged on the part of the plaintiff.

The Lord Chief Baron said that the practice of filing injunction bills, when the defendant was out of the kingdom, and thereupon obtaining an injunction for want of an answer, was an intolerable grievance which was long felt and complained of; that this Court had the credit of first applying some remedy to the evil, by requiring an affidavit of merits: that the Court of Chancery having furnished them with an authority, he was ready to comply with the present motion, and to say, that whenever a reasonable case shall be made, the fund ought to be brought into Court; and the present case seemed to be such an one.

Baron *Hotham* agreed, and added, that the adoption of this would probably put a stop to filing injunction bills in similar cases, which he was convinced were generally brought for the mere purpose of gaining time from the accidental situation of the parties.

Perryn Baron, and *Thompson* Baron concurred; and the order was made, that the money should be brought into Court in a month, or the injunction dissolved.

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EVANS *versus* LLEWELLIN.

In Linc. Inn Hall. Master of the Rolls for Lord Chancellor. Mar. 5, 1787.

Deed set aside as *improvidently* obtained, being obtained for an inadequate consideration from persons in low circumstances, and unapprized of their right until the time of the transaction, though no misrepresentation or actual fraud whatever appeared to have been made use of.

This bill was filed by Thomas Evans, Joseph Evans, and James Evans, against the defendant Llewellin, to set aside several deeds and conveyances, which had been executed by the plaintiffs, Thomas and Joseph, as having been obtained from them by the defendant by fraud and imposition; and for an account of the rents and profits of the estates comprized therein which had been received by the defendant. The circumstances of the case were as follow.

Henry Hutson, as devisee under his father's will, was seized in fee, according to the custom of gavelkind, of one moiety of a farm and lands called Breach farm, situate at Barham Downs in the county of Kent, the other moiety of which was devised to his brother John Hutson, the whole being subject to an estate for life therein of Elizabeth Hutson their mother. Henry Hutson intermarried with Elizabeth Evans, the sister of the plaintiffs, and by his will, of the 13th of April 1769, devised all his right, title, and interest in the said premises to his said wife in fee. Henry Huston died the 20th of April 1769, and in 1775 Elizabeth his wife intermarried with the defendant Llewellin. During her coverture Elizabeth Llewellin, without levying any fine, made a will dated 26th February 1776, and thereby devised all her real and personal estate whatsoever to the defendant Llewellin, his heirs, executors, administrators, and assigns for ever. Elizabeth Llewellin died 27th April 1776, leaving the three plaintiffs and another since deceased, her heirs in gavelkind; but by the custom the defendant was entitled as tenant by the courtesy to one moiety of his wife's estate, (though not in possession) until he should marry again; so that the wife's will being void,

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the premises descended to the four brothers, subject to the life estate of Elizabeth the mother, and to this tenancy by the courtesy of the defendant; but of this right in them they appeared to be perfectly ignorant. Elizabeth Hutson the mother died in December 1777, and thereupon the defendant entered into possession of the whole of his wife's estate, and on the 9th of November 1778, he intermarried with Ann Dodd, notwithstanding which he still continued in possession, although his right was determined by the second marriage. In 1784 the defendant (still treating the premises as his own, as devisee of his wife) together with John Hutson, who was the owner of the other moiety of the said estate, entered into a contract for the sale of it to John Waller of Canterbury for the sum of 700*l.* but upon the examination of the title, Mr. Waller's attorney found that the defendant had no title whatever to the moiety he claimed, the will being made during coverture, and that the heir at law of Elizabeth Llewellin must join in the sale before any title could be made. Upon which the defendant immediately came to London, and communicated this to his solicitors, Messrs. Maddock and Bigg.—The plaintiffs were at this time in very mean circumstances, being all journeymen in different trades, and quite ignorant of their title to the premises. The defendant and his solicitors not being apprized, that the premises were descendible according to the custom of gavelkind, conceived that the plaintiff Thomas Evans, the eldest brother, was solely entitled as heir at law, and upon this idea on the 19th of August 1785, the defendant wrote to the plaintiff Thomas Evans, desiring to see him the next morning on business, and accordingly the plaintiff called at the house of the defendant the next day, and was there directed by the servant *to* go *to* the Paul's Head Tavern, where he found the defendant, Mr. Henry Maddock the solicitor, and one John Bramley a tradesman, who had been desired by the defendant to attend the meeting: Henry Maddock and Joseph Bramley were examined in the cause as to what passed at this meeting. Henry Maddock deposed, "that on the 20th of August 1785 he the deponent, at the defendant's desire, met

the defendant and the plaintiff Thomas Evans between 11 and 12 o'clock at noon; and Joseph Bramley, whom the deponent understood to be a respectable tradesman, was also present at such meeting; that at the said meeting the defendant told the plaintiff, that he had sent for him on some business which the deponent would explain to him, whereupon the deponent explained to the plaintiff, that he was heir at law of his sister, and was as such entitled to her moiety of the estate in question, and also to a moiety of the rents and profits of the said estate from the time of his said sister's decease," (which seems to be a mistake made made throughout the business, for in truth no title accrued to the plaintiffs in the rents and profits until the death of the mother the tenant for life,) " and that such moiety being his sister's estate, she could have effectually disposed of it in favor of the defendant, in case she had taken proper measures so to have done, and the deponent then told the plaintiff that the intention of Mrs. Llewellin his sister, to dispose of the moiety of her estate to the defendant was manifest and clear from the circumstances of the will she had made, and the deponent read over the probate of the will of Mrs. Llewellin to the plaintiff, and at the same time remarked, that he understood that the defendant had been a good friend to the family of the plaintiff Thomas Evans, and particularly to his mother and sister; and as the intention of his sister was clear and unquestionable in respect to the moiety of the said estate, he, the plaintiff ought not in *equity* or in *conscience* to take advantage of the blunder made in the mode adopted for disposing of the said moiety in favour of the defendant; and added, that, as the plaintiff was not in very good circumstances, he thought he ought to receive some advantage, and that the defendant was willing to give him 200 guineas to relinquish his title to the said estate in favour of the defendant; to which the plaintiff said he always understood, that his sister Mrs. Llewellin had given her estate to the defendant, and his the plaintiff's family had nothing to do with it, and further said he well knew his sister's intention was to give her estate to the defendant, and that defendant had

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been always kind to his family, and therefore he would not take any advantage of the blunder so made as aforesaid, and that he should be fully satisfied with the 200 guineas for relinquishing his title in favour of the defendant: and the said plaintiff then added, that 200 guineas would do him more good than the whole of the said estate, as he well knew his sister did not intend her said estate for him; and thereupon the deponent desired the plaintiff to consult his friends and take some time to consider of the business, but he absolutely refused so to do, and said he was fully satisfied therewith; that to the best of *the deponent's recollection* and *belief*, he informed the plaintiff that the whole of the estate was worth 1700*l.* and that such sum had been offered for it, and the defendant Llewellin then desired the plaintiff to consult his wife about the business before any agreement was entered into relative thereto, but the plaintiff then also refused so to do, and for the considerations aforesaid agreed to convey to the defendant and his heirs, all his the said plaintiff's right and title to the said estate, and to the rents and profits thereof from the death of his said sister, and thereupon a memorandum of such agreement was reduced into writing by the deponent, and signed by the plaintiff and defendant, and the plaintiff seemed fully to understand the business, and particularly the explanation made to him, and well knew what he was about, and was fully apprized and acquainted with the value of the estate." Joseph Bramley deposed to the same effect, except that he spoke positively to Mr. Maddock's having acquainted the plaintiff the estate was worth 1700*l.* and that the same had been bid for it. It appeared and was a point considerably relied upon in the argument, that the rents and profits for which the defendant was accountable, beyond what he was entitled to retain during his tenancy by the courtesy, amounted to 245*l.* The memorandum was in these words, "Whereas Mr. Henry Hutson devised one moiety of a farm called Breach farm in Kent, to his son Henry Hutson and his heirs, and the other moiety to his other son John Hutson and his heirs, and the said Henry Hutson duly gave his moiety by will to his wife Elizabeth

and her heirs, which said Elizabeth after her husband's death intermarried with Henry Llewellin, and by her will devised her moiety of the said estate to the said Henry Llewellin and his heirs, and the said Henry Llewellin since her death has been in possession thereof, but cannot make any title to the said estate, his said wife not having passed a fine thereof, now, I, the undersigned Thomas Evans, the heir at law of the said Elizabeth Llewellin, considering the intention of my said sister, do hereby in consideration thereof, and of 200 guineas to be paid me, agree to convey to the said Henry Llewellin and his heirs all my right and title to the said estates, and to the rents and profits thereof from the death of my said sister. Dated 20th August 1785, signed Thomas Evans, Henry Llewellin. Witnesses *Henry Maddock*, Joseph Bramley." After the signing of this memorandum the plaintiff and defendant dined together, and at parting the defendant gave the plaintiff a guinea, and then appointed the plaintiff to meet him again at the same tavern on the 23d, which the plaintiff accordingly did, when the deeds prepared by *Mr. Maddock* were read over to the plaintiff by *Mr. Maddock's* clerk. They recited to the same purport as the memorandum, and the said plaintiff Thomas Evans in consideration of the manifest intention of the said Elizabeth Llewellin to secure to the defendant and his heirs the undivided moiety of the same premises, and also in consideration of the many kindnesses theretofore shewn, and the assistance on many occasions given by the defendant to Elizabeth Evans mother of the said plaintiff, and moreover in consideration of 210*l.* paid by the defendant to the plaintiff, the said plaintiff Thomas Evans thereby bargained, sold, &c. all the moiety of the said premises, and all his right, title, and interest therein to the defendant Henry Llewellin, his heirs, and assigns for ever. It was in proof by *Mr. Maddock's* clerk, and by Joseph Bramley, that after these deeds were read over to the plaintiff, he hesitated some time about executing them, upon which the defendant Llewellin desired him not to execute them, if he was not perfectly satisfied

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therewith, or did not understand the same, or know what he was about, and added, there would be an end of the business; upon which the plaintiff said, the defendant had been a good friend to the family, and he would execute it although he did not receive a shilling for it, and he then executed the deeds, and the defendant paid him 200 guineas all in cash. On the defendant's returning to Canterbury, he went to the attorney of Mr. Waller the purchaser, and told him he had got a conveyance from his heir at law, and upon that occasion the defendant discovered, that the lands were holden in gavelkind, and that the three brothers were co-heirs thereof; whereupon he returned to London, and upon the 27th of September 1785, he sent again for the plaintiff Thomas Evans, and acquainted him of the mistake, and that the brothers were co-heirs, and said the plaintiff ought to return 100 guineas out of the 200 guineas, and that it should go to his brother Joseph. Whereupon the plaintiff Thomas Evans signed an agreement to pay back the 100 guineas, and the plaintiff Joseph Evans being sent for at the same time signed a memorandum with the like recitals, as in the former memorandum, whereby he agreed to convey all his right and interest in the premises to the defendant, and the defendant agreed to pay him 100 guineas. And on the 30th of September Thomas and Joseph Evans executed deeds of lease and release, whereby after reciting as in the former deeds, and for the like considerations as before, they bargained and sold the said premises and all their right and interest therein to the defendant in fee. At the time of the execution of these last deeds, there were present the two plaintiffs and the defendant, and *Messrs. Maddock* and *Bigg*, the defendant's solicitors, and the deeds were attested by *Messrs. Maddock* and *Bigg*: but there was no proof of any thing particular passing at the time. The 100 guineas were not in fact paid to Joseph Evans, but it was understood that Thomas Evans was to pay over to Joseph the 100 guineas which he had agreed to return. The other proofs in the cause went to shew the several kindnesses of the defendant

to the family of the plaintiffs. And upon this case the cause came on to be heard.

The case was very fully argued on its own circumstances, particularly on the situation and necessity of the plaintiffs, the gross inadequacy of the consideration, and the improbability of the plaintiff's being fully apprized of their being entitled to receive from the defendant 245*l.* in ready money, on account of the rents and profits received by him, when they gave up that together with their whole interest in the premises for 210*l.* but there were no authorities cited, nor any principles laid down in the argument.

Master of the Rolls.—I cannot help wishing that the cases had been more looked into upon this occasion, for although probably none would have been found directly in point, yet principles might have been collected from them which would have been of considerable assistance to me. It has been truly argued, that no facts were in this case kept back from the party, no false recitals in the deeds, but that all the instruments contain a full discovery of the facts upon which the plaintiff was to make his bargain. Notwithstanding which I am of opinion this agreement ought not to stand. I lay great stress upon the situation of the parties to it, and the persons who compose the drama. The plaintiff Thomas in mean circumstances, and totally ignorant of his rights until the moment of the transaction taking place: he was then at once told of his title to this estate, and at the same time came the offer of a large sum of money if he would relinquish it. The parties present were Mr. Llewellin, his friend, whom he brought to countenance the transaction, and *Mr. Maddock* his solicitor. I must lay very great stress on *Mr. Maddock's* evidence, for he told the plaintiff what was enough to influence any but a very firm man, that as he understood the defendant's great kindness to the family of the plaintiffs, and as the sister's intention to give the estate to the defendant was clear, the plaintiff ought not in equity and conscience to take advantage of the blunder. I do not say that a confirmation of

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an act, not in itself valid, will not in any case hold without an adequate consideration: there certainly may be cases put in which such confirmation would be effectual, if proper time were allowed to the party, and due caution used in making him aware of the consequences; but here is a man destitute of money, and 200 guineas is suddenly offered him, which to a man in his circumstances, is a very important sum, and he is then called upon to convey an estate in prejudice of himself and his family for the benefit of a person in affluent circumstances. It is said he was cautioned by *Mr. Maddock;* it is true, and so far the parties did right; but they ought to have gone further; they should not have permitted the man to have made the bargain without going to consult his friends; there was not sufficient *locus penitentiæ;* there was no person present to give him advice; he was entirely in their hands, and surprised at this unexpected acquisition of fortune. The circumstances which followed with respect to the plaintiff Joseph seems to have been much the same. Thomas agreed to pay back the 100 guineas, though he was unable to do it; and therefore was within the power of the defendant, and liable to go to gaol for it. I am called upon for principles upon which I decide this case; but where there are many members of a case, it is not always easy to lay down a principle upon which to rely. However, here, I say, the party was taken by *surprise;* he had not sufficient time to act with caution; and therefore though there was no actual fraud, it is something like fraud, for an undue advantage was taken of his situation. The cases of infants dealing with guardians, of sons with fathers, all proceed on the same general principle, and establish this, that if the party is in a situation, in which he is not a *free agent*, and is not *equal to protecting himself*, this Court will protect him. I do not know that the Court has drawn any line in this case, or said thus far we will go and no further; it is sufficient for me to see that the party had not the protection he ought to have had, and therefore the Court will harrow up the agreement. I am of opinion, in this case, the

party was not competent to protect himself, and therefore this Court is bound to afford him such protection; and therefore these deeds ought to be set aside, as being *improvidently* obtained. I will not use any harsh terms, because in truth I do not think the case calls for it. I will give no costs for the same reason; and indeed if the plaintiff had in fact gone back and consulted his friends, I should not have rescinded the transaction.

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His Honour directed the defendant to account for the rents and profits received since his second marriage, out of which he was to retain 200 guineas paid to the plaintiffs.

NEWMAN *versus* NIGHTINGALE.

In Linc. Inn Hall, Lord Chancellor. March 23, 1787.

PETITION.

The testator bequeathed 500*l.* "to the sole use of Mrs. Eliz. Newman, *or* of her children for ever." Mrs. Newman was married, and all the children were infants. An order was made that the interest of this sum should be paid to Mr. and Mrs. Newman for the maintenance of themselves and their children. Mrs. Newman died, and her husband took out letters of administration; afterwards the eldest child came of age, and now petitioned for a share of the principal sum, and thereupon a question arose upon this bequest, whether Mrs. Newman took an absolute property in this sum, that is, whether the words were to be construed "to Mrs. Newman and her children," so as to give her a share equally with her children, in which case the husband would have been entitled as her administrator, or whether the bequest was to Mrs. Newman for life, and after her death to her children.

Testator gave 500*l.* "to the sole use of N. *or* of her children for ever." N. took an interest for life in the 500*l.* and it belonged to her children after her death.

And the *Lord Chancellor* was of opinion that the true construction of these words was, to give Mrs. Newman an interest for life, and the children to take it amongst them after death. And so ordered.

In Lincoln's Inn Hall. Lord Chancellor. April 17, 1787.

BACKHOUSE *versus* HUNTER.

An administratrix having an equitable demand against the personal estate of her intestate, the Court will enjoin the next of kin from proceeding in the Spiritual Court to compel a distribution; but they may proceed to compel the administratrix to exhibit an inventory.

Upon the marriage of the plaintiff with her late husband, he had entered in a written contract, whereby he stipulated that a sum of 1200*l.* which was the fortune of the plaintiff, should be to her sole use and at her disposal. He, however, got possession of this money, of which he never made any settlement, but he laid out 700*l.* part thereof in the the purchase of a house at Liverpool, and the remainder he applied to his own use. Upon his death the plaintiff administered to him and possessed herself of his personal estate, which was very inconsiderable; and she was also in possession of the house at Liverpool. She had before obtained an order for an injunction to restrain the defendants, who were the next of kin, and one of whom was the heir at law, of the husband, from proceeding at law to recover possession of this house, on the ground of the plaintiff having an equitable right to it in respect of the contract entered into by the husband on the marriage, and the bill went on to pray a specific performance of that contract. The defendant then proceeded in the Spiritual Court to compel distribution, where the plaintiff could make no defence on the equitable claim. She therefore now moved that the injunction might extend to restrain all proceedings of the defendants against her in the Spiritual Court in respect of the matters aforesaid; and *Spranger*, in support of the application, mentioned the case of *Tourle* v. *North*, in 1784, where a similar order had been made. On the other side it was said, that at best the order could not extend to stay all proceedings, since the defendants were certainly entitled to have an inventory in the Spiritual Court. This the *Lord Chancellor* agreed to; but thought it reasonable that the defendant should be restrained from proceeding in the Spiritual Court, so far as to compel distribution.

EAST INDIA COMPANY *versus* DACRES.

In Linc. Inn-Hall, the Lord Chancellor. April 17, 1787.

Order for a messenger for want of an answer. Defendant put in an answer which was reported insufficient. This being as no answer the messenger was to proceed to execute the the former order.

The defendant having stood out the previous process of contempt, for want of answer, an order was obtained for a messenger; but in the meantime the defendant having put in an answer, the messenger never executed the process.

This answer was afterwards on exceptions reported insufficient, and thereupon the plaintiff applied to the messenger to execute the process, who declined to do it without a fresh order of the Court.

The plaintiff now moved for a fresh order for a messenger; but the *Lord Chancellor* said the messenger ought to have acted under the former order; that it was unreasonable to make it necessary for the plaintiff to take out fresh process, for the answer being insufficient the contempt was never cleared, and that the messenger must therefore do his duty under the former order, as he would be liable to be complained of to the Court.

GREGSON *versus* OSWALD.

In Linc. Inn Hall. Lord Chancellor. April 20, 1787.

An order was made that the plaintiffshould set down his cause to be heard within a limited time, or that the bill should be dismissed without further order. In the meantime the suit

The defendant Oswald moved, that the plaintiff's bill might be dismissed against him for want of prosecution, upon which occasion the plaintiff was put under terms by the Court, and it was ordered that he should proceed to the examination of witnesses, and to set down the cause for hearing within a limited time, or the bill to stand dismissed without further order. In the mean time and during the pendency of this order the suit abated by the death of the defendant Oswald. Plaintiff filed a bill of revivor, but the defendants, the representatives of Oswald,

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by their answer, resisted the plaintiff's right to revive, so that the plaintiff could not revive without setting down the cause to be heard. In this situation the plaintiff being unable to comply with the terms imposed upon him, the time limited elapsed, so that if there had been no abatement, the bill would have been absolutely dismissed. Plaintiff now moved that the bill might under these circumstances be retained against the representatives of Oswald.

abated by the death of a defendant.

This abatement suspends the effects of the former order.

The *Lord Chancellor* said, he did not conceive this motion necessary; for he did not think the original order could run after the abatement of the suit, and therefore that in the events which had happened, the bill was not now dismissed; that in case of an abatement, the suit must remain precisely in the same situation as it was in at the time the abatement happened; but that in all events the plaintiff must have some remedy, whether the present form of application were the proper one, or not, and therefore it was idle in the defendants to resist it. Whereupon by consent, an order was made to revive the suit against the representatives of Oswald.

In Chancery. Lord Thurlow. April 30, 1787.

THOMPSON *versus* HARRISON.

Plaintiff by examining a defendant as a witness, precludes himself from obtaining any relief by decree against him; and if from the nature of the case, that defendant would be *primarily* liable to plaintiff, and another

The plaintiff George Thompson, and the defendant John Thompson were brothers, and were uncles of the defendant Jonathan Harrison. The plaintiff purchased an estate in the north of England for the sum of 1450*l.* of which the plaintiff paid about 1200*l.* and the residue was paid by the defendant John Thompson, and the conveyance was made to John; but as the plaintiff had given his bond to John Thompson for so much of the purchase money as was advanced by him, it appeared, and indeed was agreed on all hands, that John was a trustee of this estate for the plaintiff. A treaty of marriage having taken place between the defendant Jonathan Harrison and a Miss

Att. Gen. v. Lew 3 Leg. Rep. 489.

Liddell, the defendant John Thompson wrote a letter to the plaintiff, acquainting him of this circumstance, and that Jonathan Harrison being desirous of making a settlement on his intended wife, had proposed to purchase the premises of the plaintiff for a sum of 500*l.* in order to make such settlement; and that he (John Thompson) had agreed to sell them to Jonathan Harrison for that sum. In answer to this letter, the plaintiff wrote to John Thompson to say that he did not mean to sell the premises, but on the contrary had it in contemplation to reside upon them as soon as ever he was able to leave off business; and nothing further passed in respect of the purchase. But it appeared that about this time the defendants John Thompson and Jonathan Harrison represented to the father of Miss Liddell, that these premises were the property of John Thompson, and were intended to be advanced or given by him to his nephew to be settled on the marriage. Accordingly the marriage was had, and the premises were thereupon settled by John Thompson on Jonathan Harrison for life, remainder to the wife for life, remainder to the right heirs of Jonathan Harrison in fee. Under these circumstances the plaintiff filed the present bill against Jonathan Harrison and his wife and John Thompson, to have a reconveyance of the estate or a satisfaction. From the evidence it appeared that Mr. Liddell was certainly deceived by the defendants J. Thompson and Harrison, but that the plaintiff was by no means accessary to the deceit. The plaintiff had thought proper to examine the defendant John Thompson as a witness in the cause, and in order to give effect to his testimony had executed a release to him. He had consequently waved all relief against John Thompson, but he insisted that he had a right to relief against Jonathan Harrison, at least to the extent of his interest in the premises, *viz.* his life interest, and the remainder in fee, subject to the life estate of the wife.

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defendant only in a secondary degree, the plaintiff has lost his remedy altogether.

In cases of frauds on marriage, though the husband be a party to such fraud, yet his interest cannot be affected, if either wife or child (who is an object of such settlement) be living.

But the *Lord Chancellor* said that the plaintiff had, by his conduct, precluded the Court from giving him any relief; that, if the defendant John Thompson had not been

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released, the proper decree would have been against John Thompson in the first instance; and if Jonathan Harrison had been at all liable it would have been only in a secondary degree; but as the plaintiff had thought fit to release the principal defendant, it seemed impossible to give him any relief. With respect to the interest of Jonathan Harrison in the premises, it was a rule in cases of frauds on marriage, that although the husband were a party to such fraud, yet his interest was not to be affected, since it was impossible to make him liable in respect thereof without involving the wife and children, and the family upon whom the deceit had been practised. If the wife had been actually dead without issue, the case would have been very different; but as it stood at present, the bill must be dismissed.

DEBEZE *versus* MANN.

In Chancery, Lord Thurlow. May 2, 1787.

ON FURTHER DIRECTIONS.

Where a legacy is given for a *particular purpose* (as a portion) and another bounty is afterwards given for the *same purpose*, it is considered as implying an intention in the testator to satisfy the legacy. But this being only a *presumption* may be rebutted by evidence shewing a contrary intention.

The original will in this cause was filed by Joseph More and Kitty his wife, against Charles Mann and Lucia his wife, who was the administratrix with the will annexed of William Macguire, deceased. The plaintiff Kitty More was the natural child of the testator William Macguire, who by his will of 29th September 1778, made the following bequest, "I bequeath the mortgage bond of "1365*l.* due to me from Mrs. Manley, of Downham "Market, Norfolk, sterling 1365*l.* to Miss Kitty Meredith, "now in my house, *in order to fit her out for India*, or "dispose of her in marriage as my executors shall think "proper."

On the marriage of the plaintiff Joseph More with Kitty Meredith the testator executed a bond, dated 23d May 1781, to him for securing the sum of 1000*l.* of which sum 400*l.* was very shortly after paid by the testator to

Joseph More. The original bill stated the remainder of the said sum of 1000*l.* to have remained due at the testator's death, and prayed an account and payment of what should be found due on the said bond, and also an assignment of the said mortgage bequeathed to the plaintiff Kitty by the said will. The defendants by their answer insisted that the testator in his lifetime besides the said sum of 400*l.* had paid to More the further sum of 600*l.* which was in full satisfaction of the said bond, and that the said bond having been given to secure a marriage portion, that the same should be taken as a satisfaction or ademption of the said bequest of the mortgage, which was expressly given for the same purpose, or at least that it should be a satisfaction *pro tanto*.

The plaintiff Joseph More having become bankrupt a supplemental bill was filed by his assignees Debeze, Gautier, and L'Homme.

The only material evidence in the cause was that of John More the bankrupt's father, who deposed that "during the treaty for the said marriage the said testator "William Macguire offered or proposed to give 1900*l.* as "a portion or fortune with the said Kitty Meredith, on or "soon after the solemnization of the said marriage, and "that when the said William Macguire first proposed the "said marriage to the deponent, he the deponent told the "said William Macguire that he knew his son could "marry more advantageously, but that he the deponent "would mention it to him; that the said William Mac-"guire then expressed a desire that the matter might be "concluded as soon as possible, but said that *he* could "*not on her marriage* give her more than 1000*l.*, *but that* "*there would be something more for her hereafter*, which "the deponent then understood to mean at his death, as he "then said *his life* was a very bad one."

This cause coming on to be heard before the *Lord Chancellor* on the 14th July, 1786, it appeared that since the filing the bill the assignees had brought an action of debt against the defendant Lucia (as administratrix of the

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testator) on the said bond for the recovery of the 600*l.* and they obtained a verdict for the 600*l.* together with 123*l.* 6*s.* 5*d.* for interest on the evidence of the said Joseph More the bankrupt, who said that the 600*l.* mentioned in the pleadings to have been paid by the testator in his lifetime, was not so paid by him in satisfaction and discharge of the said bond, but was paid for furniture and clothes provided on the marriage, and on this verdict being obtained, the defendant Lucia paid the assignees the said sum of 723*l.* 6*s.* 5*d.*

Whereupon the *Lord Chancellor* referred it to the Master to inquire what sum or sums of money were advanced by the testator in his lifetime to Joseph More and Kitty his wife, or either of them, subsequent to the date and execution of the said will by *way of marriage portion*, or in any other manner, and that he should state the particular circumstances under which the same was paid.

The Master reported that subsequent to the date and execution of the said will, and soon after the marriage of Joseph More and Kitty his wife, the said Joseph More received for the use of the said William Macguire the sum of 400*l.* which sum the said Joseph More, with the consent of the said William Macguire, retained in part of the said sum of 1000*l.* due upon the said bond, which bond was given and executed by the said William Macguire to secure to the said Joseph More the payment of the said sum of 1000*l.* by way of marriage portion of the said Kitty his wife, and that since filing the plaintiff's bill the assignees brought an action on the said bond as above-mentioned, and recovered payment of the said sum of 600*l.* and interest and costs; and he also found that subsequently to the date and execution of the said testator's will, *viz.* on 17th June 1781, the said William Macguire signed and delivered to the said Joseph More a draft on his banker for payment to the said Joseph More of the sum of 600*l.* which sum of 600*l.* the said Joseph More soon afterwards received, and which sum of 600*l.* was

advanced by the said William Macguire by way of further marriage portion of the said Kitty More.

Scott, for the plaintiffs, argued that this legacy of the mortgage had not by any means been satisfied or adeemed by the testator in his lifetime. The question is not whether the legatee has or has not been advanced to or beyond the extent of the legacy; but whether upon the whole case it appears that such advancement was or was not intended to be an execution of the testator's will in his lifetime. Now it is in proof in this case that the 1000*l.* given or secured by bond on the marriage was not meant as an execution or a part execution of the will; for the testator expressly declared that the plaintiff Kitty would have something more *afterwards*, which by the context appears to have meant at his death. As to the 600*l.* given by the testator afterwards, that does not satisfy this declaration which certainly related to something which she was to have by his will; but if this were not so, yet how can this Court take upon itself to determine the question of the testator's intended bounty, or say that he did not mean her both the 600*l.* and the legacy? The case of *Shudal* v. *Jekyll*, 2 *Atk.* 516, seems in point to the present.

Attorney-General, *Mansfield*, and *Milford*, for defendants.—A rule of presumption has been established in Courts of Equity, that where a legacy is given expressly for a particular purpose, and that purpose is afterwards answered by something done by the testator in his lifetime, that shall be considered as an execution of the will and shall adeem the legacy. Where a parent therefore makes a provision for a child by will and afterwards advances to that child in his lifetime a portion, such advancement shall be considered as having executed the purpose of the will, and the testamentary provision shall not have effect. And this rule has been extended to persons standing in *loco parentis*. Although there has been a difference made by some of the cases between legacies given expressly as portions and general legacies, the result seems to be that even a general legacy given by a father to a child shall be considered as

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a portion, and that he shall be understood to pay, as it is called, the debt of nature. However, there is no case, where a parent or person in *loco parentis* has given a legacy by will expressly as a portion or provision, and where a subsequent advancement made for the like purpose, if stripped of all other circumstances, has not been considered as an ademption of the legacy; at least, where the advancement is equal or greater than the legacy. This rule is laid down in *Ireland* v. *Hurst*, 2 *Freem.* 224, and indeed is expressly recognized in *Shudall* v. *Jekyll*, for in that case Lord *Hardwicke* takes the distinction between a parent or person in *loco parentis*, and a collateral relation or stranger. Now in this case there is no doubt but that the testator being the natural father, if not in legal strictness a parent, is at least a person standing in *loco parentis*; the legacy is given expressly to dispose of the legatee in marriage. If the case therefore stood independent of the parol evidence, there could not be a doubt but that the legacy would be satisfied. Now, with respect to the parol evidence: It is now too late to contend that in these cases parol evidence is not admissible, though in *Fowler* v. *Fowler*, 3 *P. W.* 354, Lord *Talbot* doubted much of the propriety of admitting it. But what is the effect of it in the present case? The single witness examined to this point is the father of the bankrupt, who swears that at the time of the treaty for the marriage the testator apologized for the smallness of his daughter's fortune, but added that she would have something more afterwards: if the evidence had stopped here, the promise (if it can be so called) would have been fully executed by the 600*l.* which the testator afterwards gave the husband, and which now appears upon the Master's report to have been *as a further marriage portion*. But the witness goes on to say that *in his apprehension* the testator meant to speak of some future benefit by will, for which the only reason he gives is, that in the course of the conversation he said his life was a very bad one: and upon this apprehension of the witness, resting upon this very slight circumstance, the

whole case must rest; and the Court is required to say, that though the testator at the time of making his will thought 1365*l.* a sufficient portion for his natural daughter, yet for some reason or other he changed his mind, and thought she ought to have more than double that sum.

Lord Chancellor.—Where a father makes several gifts to a child, one of which is by will, and a subsequent one is by advancement in his lifetime, though the latter hath no reference to the former, yet when it is given on the *same occasion*, and for the *same purpose*, this Court has been in the habit of raising a presumption *primâ facie* that the latter was intended in satisfaction of the former; but yet this only is a presumption, and nobody can reason upon this subject without thinking how often such a rule must disappoint the intention of the donor. The supposition must be that he forgets what he has given by will; and in establishing such a presumption the Court does not recollect how much a change of affection, a change of circumstances, or a prospect of a better marriage may alter his first intention. However, this point seems now to be so far fixt, that one cannot deny but that such a presumption does arise under such circumstances; but it being only a presumption, it is consequently to be defeated by evidence. Now in this case the father made an apology for the smallness of his child's fortune; he said it was not convenient for him then to advance more than 1000l. his intention to give her the mortgage still remaining upon paper; the existence of this at the time is not an immaterial circumstance to explain his intention: but the evidence goes to a more minute conversation, for he adds that she should have more afterwards, and that his life was a very bad one. Now this could only be said to shew that what she was to have afterwards was the more valuable, because it was to accrue within a short space of time, and I think that the father understood him rightly when he said so. If it had rested here therefore, I must have considered the *primâ facie* presumption as answered by this evidence, and that the testator had not fully executed *his purpose of providing* for his daughter; for the idea of the law is, that by the sub-

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sequent advancement he means a *complete execution* of his *parental purpose*, and one may be deceived by calling this a *debt* of nature: it is merely a pious parental purpose. Then the question is whether the advancement of the 600*l.* is to be understood as an execution of all he meant by his will. It was given after marriage, and indeed was not strictly an advancement: it was more like a general gift: but the fact is, that this gift does not correspond with the conversation, which certainly imports that the further gift was not to have effect until his death. I therefore think that the father giving the husband this sum of 600*l.* does not go the whole length of satisfying the legacy, seeing from the conversation that the former advancement was not so meant; and the testamentary provision still remains due.

At the Rolls. Sir Lloyd Kenyon. May 1, 1787.

MORSE *versus* SADLER.

Every legatee whose legacy is charged on *real* estate ought to be before the Court.

The testator devised a freehold estate to William Sadler, "chargeable only with the several legacies therein after mentioned." He then proceeded to give a very considerable number of legacies. This bill was filed (for the purpose of saving expense) by one of the legatees on behalf of himself and all the other legatees, without making the others parties. But his Honour said that it was an established rule that the legatees out of personal estate *only*, need not be parties, but every person claiming an interest out of *real* estate must be before the Court, and directed the cause to stand over to add the other legatees as parties.

Bill by creditor against a trader dying intestate for sale of real estate. prior incumbrancers not necessary parties - Parker v Pullen 656. 1 Rd. M. -

Re Stuart 4 Beg. V. I. 318.

SKIPP *versus* WYATT.

At the Rolls. Sir Lloyd Kenyon. May 23, 1787.

The devisee of a mortgagee filed his bill against the heir and executor of the mortgagor, for a foreclosure, and also made the heir of the mortgagee a party in order to establish the will against him. This latter party cannot have his costs out of the estate.

The plaintiff was devisee of a mortgagee, who devised to him the mortgaged premises and the money due thereon. The bill was against the heir and executor of the mortgagor for a foreclosure, and the heir of the mortgagee was also made a defendant to have the will established against him. His Honour directed an account of the plaintiff's principal interest and costs; but as to the costs of the heir of the mortgagee, his Honour thought the estate ought not to be burthened with them, he being made a party by reason of the act of the mortgagee in the disposition of his property; and the plaintiff must therefore pay the heir his costs, and he would not be entitled to have them over from the estate.

MOUNTAIN *versus* BENNET.

In the Exchequer. Lord Chief Baron Eyre. Barons Hotham, Perryn, Thompson. May 9, 1787.

Although a man have a mind of sufficient *soundness* and discretion to regulate his affairs in *general*, yet if such a dominion or influence be obtained over him as to prevent his exercising such discretion in the making

On a trial at the bar of the Court of Exchequer.

This was the trial of an issue *devisavit vel non*, directed by the Court of Chancery to try the validity of the will of a Mr. Bennet, whereby he had given a very considerable real estate in the county of Wilts to his wife in fee, charged only with his debts and some legacies.

The ground upon which the heir at law, who was uncle of the testator, impeached the will was of this kind; that the testator was naturally a very weak and childish man, and also much addicted to drinking, which he had carried to such an excess as to affect both his mind and body very considerably; that the devisee, who was then Mrs. Harford a widow, finding him in so miserable a situation in point of health as to render it next to impossible that he should

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his will, he cannot be considered as having such a *disposing mind,* as will give effect to his will.

Quere, What evidence will be sufficient to establish such a case.

remain long alive, concerted a scheme with a Mr. Parry, whom she married since Mr. Bennet's death, and with whom she had been before connected, that she should marry Mr. Bennet, who had before expressed some inclination for her, and that she should obtain from him a will to the effect of that in dispute, by taking advantage of his natural imbecility and acquired habits of intoxication; that in pursuance of this scheme, she did marry him, and obtained from him the will in question, and that within three weeks or a month after the marriage Mr. Bennet died.

The will was attested by four witnesses, three of whom were examined on the part of the plaintiffs, and agreed in saying that Mr. Bennet, though not a man of strong natural understanding, was yet capable of transacting his business, and that he appeared perfectly sensible when he executed this will. These witnesses were all persons of most unimpeached character and of considerable situation in life. On the part of the defendant a great number of witnesses were called to prove the weakness of the testator's mind, and they also rested much on a letter written by Mrs. Bennet to Mr. Parry, during Mr. Bennet's life time, whereby she states her opinion of his weakness both of body and mind, and of the ascendancy she had obtained over him, and the means whereby she had obtained it.

The trial lasted about 11 hours. In summing up the evidence to the jury the *Lord Chief Baron* began by stating, that the question for their consideration was whether by the paper writing in dispute Mr. Bennet did or did not well devise the lands, &c. therein mentioned. That question necessarily involves in it an inquiry into the state of mind of the testator, and into the formalities which the law has made necessary to the due execution of a will. As to the formalities, there is in this case no doubt; it is admitted on all hands that this writing was executed with all the forms required by the statute. As to the state of mind of Mr. Bennet, a great body of evidence has been produced on the one side and on the other. These two things which have been already mentioned, namely, the formality of the in-

strument and the sanity of the person, must be made out in the first instance by those who support the will, but although these should be made fully out, yet there are other questions which may arise incidentally, and other circumstances which, if made out, will avoid the will. For instance, if it should be demonstrated that actual force was used to compel the party to make the will, there can be no doubt that although the formalities required had been complied with, and the party were perfectly in his senses, yet such a will could never stand; but it is incumbent on the party who impeaches the will, to shew this. There is another ground, which though not so distinct as that of actual force, nor so easy to be proved, yet if it should be made out, would certainly destroy the will; that is, if a dominion was acquired by any person over a mind of sufficient sanity to *general purposes*, and of sufficient soundness and discretion to regulate his affairs in *general;* yet if such a dominion or influence were acquired over him as to prevent the exercise of such discretion, it would be equally inconsistent with the idea of a disposing mind: and perhaps the most probable instance of such a dominion being acquired is that of an artful woman like the present, having taken possession of a man and subdued him to her purpose. Other cases might be put in which a will would not be valid although executed with all the formalities of the statute and by a man perfectly in his senses; but as they do not apply so much to the present question, as those I have already mentioned, I shall forbear the consideration of them. On a general view of this case, it must turn on one or other of these grounds; namely, either on the general capacity of Mr. Bennet to act for himself in the momentous instance of making his will, or on the ground of a dominion or influence acquired over him by this woman, with whom he had most unfortunately connected himself. I expected the defendants would have resorted solely to the the latter ground as being the most easy to establish after the weight of the plaintiff's evidence. I have watched the cause very minutely in its progress to see whether there is any substantial reason to impeach the will on the ground

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of dominion or influence, and upon the whole I think there is not, and the case must come back to the question of sanity. It does not appear on the state of the evidence, that this woman originally threw herself in the way of Mr. Bennet; he was naturally a debauched man and fond of women; in that state he took a fancy to this woman, and in fact he sought her more than she sought him. There is actual proof of applications from him to her after the death of Mr. Harford for an interview, and he certainly was a volunteer in the business. The man seems to have taken a very unfortunate attachment to a very unworthy woman, and afterwards to have followed it up to the point of matrimony. He was ashamed of what he had done, and, as long he could, he kept it a secret. The marriage therefore upon which the whole conspiracy (if it were such) must be founded, seems to have been of his own seeking. Then if this be the nature of this fact, as to the idea of his not being able to act for himself as being in the hands and possession of this woman, the evidence does not support it; and many circumstances go very pointedly to shew he was not so. It appears that he had frequent opportunities of seeing other people separate from her; indeed for some time, I believe for the first week, she did not live in the same house, though when he was no longer able to keep the marriage secret, they did live together. I see therefore no plan made out in this woman or her confederates to obtain this will. If the whole were a management and contrivance, it was very cunningly conducted. I have stated so much of the general nature of the evidence, that I may come to the true point upon which you will have to apply the evidence which has been given; namely, whether Mr. Bennet was of sound and disposing mind, and capable of making a will. Now I do not think it necessary to go so far as to make a man absolutely insane, so as to be an object for a commission of lunacy, in order to determine this question, which is whether he was of sound and disposing mind, memory, and understanding; a man perhaps may not be,

insane, and yet not equal to the important act of disposing of his property by his will. *Mountain v. Bennet.*

His Lordship then summed up the evidence particularly as applicable to this last point, and concluded by saying, that upon the whole, and consideration of the respective characters and situations in life of the witnesses for the plaintiff and defendant, he thought the weight of evidence was in favor of the plaintiff.

The jury found a verdict for the plaintiff immediately.

At the Rolls. Sir Lloyd Kenyon. May 23, 1787.

HODGES *versus* SMITH.

Decree in a suit of interpleader against a defendant, who did *not appear.*

This was a bill of interpleader filed by the lessee of some premises in Westminster, praying that the defendant might interplead as to their right to a rent of 80*l. per annum* due from the plaintiff in respect thereof. Both the defendants put in their answers, which were replied to; but at the hearing one of the defendants did not appear. His Honour at first had some doubt of making his final decree under these circumstances; but afterwards on hearing the appearing defendant's case, he directed the arrears of rent and the accruing rent to be paid to him; and also directed that the plaintiff should retain his costs, and that the costs so retained, and also the appearing defendant's costs should be paid by the other defendant: and *the injunction was made perpetual against him.*

At the Rolls. Sir Lloyd Kenyon. May 24, 1787.

MACARMICK *versus* BULLER.

On marriage a sum of 9000*l.* was vested in trustees upon

On the marriage of Mr. and Mr. Macarmick, it was agreed that a sum of 4000*l.* which was Mrs. Macarmick's fortune, together with a further sum of 5000*l.* to be ad-

Macarmick v. *Butler.*

trust to pay the interest to the husband for life, and after his death, to *the wife for life*, and *after the death of the survivor*, to pay the principal to such persons as the survivor should direct. The husband having occasion for money, the wife joined him in executing a deed poll, whereby they appointed the money *immediately* to the husband; but the trustees declining to act without the directions of the Court, this bill was filed; and upon personal examination of the wife, the Court directed the trustees to pay the money to the husband and to deliver up the settlement to be cancelled.

vanced by Mr. Macarmick, and for the securing of which he agreed to convey certain real estates to trustees for that purpose, should be assigned to the said trustees upon trust to pay the interest of the whole to the husband for life, and after his death, to the wife for life, and after the death of the survivor to pay the principal to such person or persons as such survivor should appoint: and Mr. Macarmick accordingly executed a bond to the said trustees conditioned for the performance of the terms of such agreement. The marriage was afterwards had, and upon the said sum of 4000*l.* being paid, (it being lent on mortgage at the time of the marriage), the same was by deed settled to the uses aforesaid, and Mr. Macarmick thereby covenanted to secure the 5000*l.* upon his real estates as abovementioned.

Mr. Macarmick having occasion for money and being about to leave the kingdom, and go as as governor to Cape Breton, Mrs. Macarmick agreed to give up her interest under the bond and settlement, to her husband, and accordingly by deed poll Mr. and Mrs. Macarmick appointed this money to Mr. M. immediately and absolutely. The trustees not being willing to act without the directions of the Court, this bill was filed by Mr. Macarmick against the trustees and the wife, praying this deed poll might be carried into execution, and that the bond and settlement might be delivered up to Mr. Macarmick to be cancelled. The trustees and the wife by their answers, said they were desirous of having the prayer of the bill complied with, as being for the benefit of the family under their present circumstances.

And after examining Mrs. Macarmick in Court, his Honour decreed accordingly.

KNOX *versus* BROWN.

In Lincoln's Inn Hall. Lord Thurlow. May 25, 1787.

Order made on the motion of the *plaintiff* to dismiss his bill *without costs*, the defendant having by *his own act* rendered the suit useless.

The plaintiff became surety for the defendant to the city of London, for the due performance of covenants contained in a lease from the city to the defendant, and upon that occasion the defendant agreed he would assign over that lease to the plaintiff to indemnify him in that respect. The plaintiff was afterwards called upon and obliged to pay 100*l.* and upwards to the city on the defendant's account for arrear of rent, whereupon he filed this bill to compel the defendant to perform his agreement to assign the lease. After the bill filed, the defendant surrendered the lease to the city, and absconded in Scotland. Under these circumstances the plaintiff on the last day of the Term, moved that he might be at liberty to dismiss his own bill *without* costs, on the ground that the defendant had by his own act, i. e. by the surrender of the lease, rendered this suit useless, and that it would be hard to make the plaintiff incur a further expense by prosecuting a useless suit, against an absconding party. The *Lord Chancellor* then thought the application reasonable; but that the notice ought to be, that the defendant should find security for costs, or that the bill should be dismissed without costs.

Cooke now moved accordingly; but the defendant who had opposed the former motion, did not now appear.

Whereupon the *Lord Chancellor* upon reading an affidavit of service, and also an affidavit of the facts above-mentioned, ordered the plaintiff's bill to stand dismissed *without* costs.

In the Exchequer.
Lord Chief Baron Eyre,
Barons Hotham.
Perryn,
Thompson.
June 8, 1787.

Defendant having answered the original bill, plaintiff amended it, and the same defendant then put in a general demurrer to the whole amended bill.

Quere. Whether this is a ground for taking the demurrer off the file, or only for over-ruling it on argument.

ATKINSON *versus* HANWAY.

The plaintiff Christopher Atkinson filed his bill against the several defendants who were the commissioners of the Victualling Office, and to this bill most of the defendants put in their answers. The defendants having denied several charges in the bill, the plaintiff thought it necessary to state several conversations between the plaintiff and the defendants very much at length, and for that purpose amended his bill and stated those conversations. This amended bill was referred by the defendants for impertinence, and the Master having reported it impertinent in several particulars, the plaintiff excepted to the report, and the exceptions came on to be argued in December 1786, when the exceptions were over-ruled and the Master's report confirmed. In March 1717 the plaintiff again amended his bill, and to the second amended bill one of the defendants put in a general demurrer to the whole bill for want of equity. The plaintiff now moved that this demurrer might be taken off the file and suppressed for irregularity; and the main objection made to the demurrer was that it was in fact over-ruled by the answer put in to several of the facts of the original bill, which remained a part of the amended bill; that these answers remaining still of record must be taken notice of by the Court, and that these answers were inconsistent with the general demurrer, which extended as well to the remaining parts of the original bill, as to the additions made on the amendment.

In answer to this it was said that in order to suppress a demurrer for irregularity the plaintiff must shew that it was filed contrary to some general rule or practice of the Court; that the general rule to be insisted upon on the other side, must be that a defendant who has answered the original bill, can in no case demur generally to an amended bill, which contains any part of the original bill, to which the defendant has answered; that no such

rule can possibly exist, for it was a very easy case to happen that a plaintiff by his amendment might completely alter his case and state himself out of Court, so that a demurrer would most obviously lie, and it would be very hard to say that because some small part of the original bill remains, a defendant should not be at liberty to stop the suit by a demurrer where the plaintiff has no merits upon his own shewing; that unless the objection was to be made upon some such general rule, this was not the stage of the cause in which the objection can hold, but it must be taken advantage of in the argument of the demurrer; that in the common case of a demurrer and answer to the same part of a bill in the same record, where the answer must evidently over-rule the demurrer, yet the Court did not take notice of it as an irregularity; but the on argument demurrer was over-ruled. So here the regularity of filing the demurrer can never depend upon an examination of the matters contained in other parts of the record, which must be left until the merits are argued in the regular way,

The Lord Chief Baron and *Hotham B.* were of opinion that as the answer remained part of the record, the Court might take notice of the contents so far as to determine a demurrer to be irregular, which went to cover the parts of the bill which were before answered: and if this appeared to be so, it was as fatal to the demurrer, as if both answer and demurrer had originally belonged to the same record, and that as to the objection made to the general rule, that the plaintiff might state a distinct case by his amended bill, the answer is that when the case happens that the plaintiff makes a perfectly new case by the amended bill, the Court would not consider an answer to a few formal or immaterial passages in the original bill, which might remain a part of the amended bill, as any answer at all; but here it seemed admitted that several substantial passages are answered.

Perryn B. and *Thompson*, were inclined to think that this objection was not properly made on this occasion, as a matter of irregularity, and that the demurrer seemed properly filed in point of practice; but that the objection

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and willing to produce all such receipts for the inspection of the plaintiff, in case the Court should think fit to direct him so to do. He also admitted that he had in his custody an ancient plan or survey of the township of Ilderton, purporting to be made in the year 1728, which was in the lifetime of the defendant's grandfather, and said that the said plan or survey appeared to have been drawn with the greatest care and accuracy, and that there did not appear to be the least notice taken or any mention made of any glebe lands or any lands belonging to the church. The defendant then stated by his answer that if ever there were any glebe lands specifically set off and enjoyed in the township of Ilderton by the rector of the said parish, he believed that the said lands had been legally and effectually conveyed to his the said defendant's ancestors, or to those whose estate they had or enjoyed, and under whom he the said defendant claimed, and that the annual sum of 12*d.* was duly reserved and made payable and issuing from and out of such glebe lands, and some other lands within the township of Ilderton aforesaid to the incumbent for the time being of the said church in lieu thereof, and that such yearly sum had been constantly paid to the said incumbent accordingly by the owners of the lands within the said township of Ilderton.

It was now moved on the part of the plaintiff that the defendant Thomas Ilderton might produce all the receipts from the rectors to the owner of the land acknowledged by the defendant to be in his custody, and also the ancient map and survey of the township, and leave them for the inspection of the plaintiff.

In support of the motion it was said that the documents now asked for were not muniments of the defendant's title, for it was admitted that the defendant was in possession of the lands which either belonged to the plaintiff, or out of which a rent was issuing to the plaintiff, and the only doubt was on the boundaries of these lands which had been confounded by the act of the defendant; that under these circumstances there was a privity between the plaintiff and defendant which gave the plaintiff an interest sufficient to

entitle him to what he now asks, and this is not within the rule of these cases where a plaintiff calls for the evidence of the defendant's title, without having first established an interest in the matters in question. That the case of *Wilkinson* v. *Allott*, 7 *Bro. P. C.* 518, was an authority for compelling a production of the map required; and indeed that case turned almost entirely upon the evidence of a similar map, that according to the reason in *Radcliffe* v. *Fursman*, 3 *Bro. P. C.* 538, a plaintiff was entitled to a discovery of all the defendant had said, *done* or *written* concerning the matter in question, and the Court of Chancery and afterwards the House of Lords compelled the defendant in that case to produce a case laid by him before Counsel, though they allowed his demurrer as to the opinion given by the counsel in answer.

The *Lord Chief Baron* said, that however cautious the Court will be in making orders for general production of instruments, yet the moment a plaintiff has established an interest in any instrument, he has certainly a right to have a production of it; at the same time it would be very dangerous to order a production upon all occasions on confession of instruments being in a defendant's hands; that however, upon the present case, his Lordship thought the receipts and the map ought to be produced: the defendant by his answer admits the tenure, but it seems that the boundaries are destroyed. Now the tenant is bound to preserve the boundaries: if a rent be issuing out of land, and the boundaries are lost, the tenant is obliged to discover them: a privity therefore is established between the plaintiff and defendant. The articles called for by the plaintiff are, 1st, The receipts. Now where no actual deed exists, receipts are the only evidence of tenure, and they are evidence on each side, for the plaintiff operating as an acknowledgment of the payment of the money, on the part of the defendant by accepting the receipts, and for the defendant as a discharge for such payment, and they seem exactly in the situation of leases and counterparts. 2dly, The map specified in the answer. Now with respect to the map, that stands on a different footing: it is a map

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of the whole township; it is admitted the defendant has the glebe, but the doubt is, whether he holds it as tenant at will, or absolutely, subject only to pay a composition out of it by way of perpetual rent. In these circumstances he is bound to give the best account of the matter he can. This map is not a private muniment of the defendant's title against others, but merely a description of lands within the township, and it may certainly throw great light upon the subject: at the same time there can be no danger of any discovery of title. The situation of the parties is admitted to be such as shews the defendant to be bound in conscience to give the plaintiff the best account he can. His Lordship was of opinion therefore that the receipts and map ought to produced. The other Barons concurred.

In the Exchequer, Lord Chief Baron Eyre, Barons Perryn, Thompson. June 12, 14, 1787.

SCOTT *versus* SCOTT.

FRAUD ON MARRIAGE.

Upon a treaty of marriage between A. and B. the mother of A. being entitled to one-third of a farm and stock of which A. was in possession, represented to the father of B. that the farm and stock belonged to A. and that A. was not indebted to any body. The mother after-

William Monk Scott and Elizabeth his wife, late Elizabeth Davis, daughter of Morgan Davis, Complainants.

And

Hannah Scott, widow, mother of the said William Monk Scott, Defendant.

This bill was filed to have a bond delivered up to be cancelled, which had been executed by the plaintiff William Monk Scott to his mother the defendant; and it stated that in June 1782, John Roberts an attorney, was employed to prepare a bond from the said plaintiff to the defendant, for payment of a sum of 1000*l.* which bond was prepared accordingly and executed by the plaintiff, and bore date the 27th day of June 1782; that in July 1782, after the execution of the said bond by plaintiff, a treaty of marriage was set on foot between the two plaintiffs; and the plaintiff Elizabeth's father, Morgan Davis, being in-

Money v Borden 15 Beav. 379.

formed thereof by them, and applied to for his consent thereto, declined to give the same until he inquired into the circumstances and situation of the plaintiff William, and in order to inform himself thereof, on the 22d of July 1782, applied to the defendant Hannah Scott, and informed her that the plaintiff William had made a proposal of marriage to the plaintiff Elizabeth his daughter, and desired to know of the said Hannah Scott, what were the circumstances of the plaintiff William, and whether he owed any money; and the said Hannah Scott thereupon assured the said Morgan Davis, that the plaintiff William did not owe any thing or any money on bond or note or otherwise to any person, and she entirely concealed from the said Morgan Davis that he had given her such bond, and did not give any intimation thereof to him; that on the 1st day of August 1782, the said John Roberts, with the privity of the said Hannah Scott, informed the said Morgan Davis that the said plaintiff William was not indebted to any person, and concealed the said bond; and the said Morgan Davis confiding in such assurances of said Hannah Scott and John Roberts, gave his consent to the marriage, and on the 1st of October 1782, they were married accordingly, and the said Morgan Davis paid the said plaintiff William a portion or fortune with the said plaintiff Elizabeth: that the said Morgan Davis would not have consented to the said marriage, or given the plaintiff Elizabeth such portion, if he had been informed the plaintiff William had given such bond to the said Hannah Scott, and the concealment of the said bond from the said Morgan Davis by the said Hannah Scott, was *a fraud upon the said Morgan Davis* and the plaintiff Elizabeth, and for that reason the same ought to be delivered up to be cancelled.

The defendant, by her answer, admitted the bond to have been executed at the time mentioned in the bill, and gave the following account of the consideration:—That a little time before the marriage of the plaintiff William with the plaintiff Elizabeth, and before the said Morgan Davis made the application to the defendant, she the defendant as administratrix of Thomas Scott her late hus-

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wards takes a bond from A. for the amount of her one-third part of the farm and stock, &c. which were settled on the marriage. Equity will relieve A. and B. against that bond, as being a fraud upon the marriage.

Quere. Whether the wilful concealment, by a creditor, of his debt (otherwise good) from the parent of a woman upon a treaty of marriage between her and the debtor, is *alone* sufficient to vitiate the debt.

The parent is not a necessary *party* to such a suit, but is a competent *witness* to prove the fraud on a bill filed by the husband and wife.

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band (who died intestate) settled and adjusted all accounts of the said intestate's effects with the said plaintiff William, the only son, and Ann wife of John Phelps, the only daughter of the said intestate, and which settlement was made with the assistance of the said John Roberts, and upon such settlement it appeared that the said intestate's personal estate to be distributed amongst the said defendant and the said plaintiff William and Ann Phelps amounted to the sum of 341*l.* 15*s.* 11*d.* and on such settling it was agreed that the defendant's distributive share of the said intestate's personal estate amounted to the sum of 1000*l.* and that her share was worth full 1000*l.* but, in order to prevent the stock in husbandry from being sold off the farm rented by the said intestate in his life-time, and in which the said plaintiff Williams continued to live until some time before the marriage (and still had the enjoyment of the said stock), the said plaintiff agreed to execute to the defendant the bond aforesaid; that in consequence of such settlement the defendant, together with the said Ann Phelps her daughter, joined in assigning to the plaintiff William before his marriage with the plaintiff Elizabeth a leasehold estate for 99 years, determinable on three lives in the county of Dorset of the yearly value of 55*l.* in which the defendant and the said Ann Phelps were interested as being part of the personal estate of the said intestate, and thereby the said plaintiff William was enabled to settle, and did settle the said leasehold estate on his marriage, and that the property which the said plaintiff William took out of the said intestate's estate, including the said leasehold estate, was of the value 218*l.* 15*s.* 11*d.* exclusive of all debts. The defendant then admitted the application to her by the said Morgan Davis respecting the circumstances of the plaintiff William, and that she represented him to be in good circumstances, but could not recollect whether she told the said Morgan Davis any thing as to any bond or debt due from the said plaintiff William, or that the said Morgan Davis asked respecting any such bond or debt, and she positively denied any intentional concealment, or any directions to Roberts to conceal the said bond from Morgan Davis.

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On the hearing of the cause, the plaintiffs offered to read the evidence of Morgan Davis the father of the plaintiff Elizabeth, which was objected to by the defendants.

Newnham, *Scott*, and *Richards*, for the defendant, argued that this evidence was inadmissible; it is an established principle that all parties interested must be parties to the suit, and before the Court, and consequently no person who has such an interest as to make him proper to be a party, can be a competent witness in respect of such interest. The question will then be, whether Morgan Davis ought not to have been a party in respect of the interest he had in the transaction. The cases which seem to apply to this point are *Redman* v. *Redman*, 1 *Vern.* 348. *Neville* v. *Wilkinson*, before Lord *Thurlow* in 1782, in which case Mr. Robinson the father of Mrs. Neville was a plaintiff, and the Court was distinctly of opinion that he had an equity against the defendant. *Thompson* v. *Harrison*, before Lord *Thurlow*, April 30, 1787. (*a*) These cases afford a clear principle that Courts of Equity consider the father's being imposed upon in an article of contract on marriage, as a ground for giving *him* relief, and that his interest in the settlement of a child is such as to support a suit to set aside any transaction in fraud of such settlement. In this case there are distinct charges of the father having stipulated expressly with regard to the circumstance of the husband. If this be so, the father has such an interest in this question as to make him an incompetent witness. If the wife had sued alone, it might have afforded a different consideration; she might have had a distinct equity; but here she sues with her husband, and the husband is as much a party to the fraud as any other person. The father therefore has the only clear interest in the question. This case is on a distinct ground from those on marriage brocage bonds, for there the vice is in the original contract; here the contract was undoubtedly good

(*a*) Ante, fol. 344.

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in its origin, or it would have been so, if it had stood independent of the treaty of marriage, and it is to be affected (if at all) by the bargain made by the father, by which the interest accrued to him.

Burton and *Lloyd*, for plaintiffs.—The only question at present is, whether Mr. Davis is a competent witness. Now in the first place the defendant has made him so, by having cross-examined him. But independently of that, there is no solid objection to his evidence. The evidence is not to be rejected, unless the interest of the party is of a pecuniary nature, or unless he is a necessary party, or has made himself a party. When therefore the husband will not sue for relief himself, or where the friends of the wife chuse to make themselves parties, they are permitted so to do; they stand in the situation of guardians, or relators, or common informers, for the purpose of preventing a public mischief, and when they have so made themselves parties, then the formal objection holds, that their evidence is inadmissible. Now all the cases on this subject prove no more than this, that they are permitted to make themselves parties; but there is no case to shew they are necessary parties. It is true the father in this case has such an interest as would have entitled him to have made himself plaintiff if he had thought fit so to have done; but as he has not done so, his evidence is unobjectionable. It is sufficient if any person complains who has an interest in doing so, and the daughter in this case is fully competent so to do; and indeed in most cases the parent has such an *exclusive* knowledge of the transaction, that if it were necessary to make him a party, the remedy would be defeated for want of evidence. In *Roberts* v. *Roberts*, 3 *P. W.* the friends of the father's wife were not parties, who stood in the same situation with the present Mr. Davis.

Lord Chief Baron.—I think we shall see the real grounds of the objection more clearly in the course of the hearing of the cause. What therefore I say now, I shall say with a reservation of liberty of changing my opi-

nion, when I shall have heard the whole of the case. In my first apprehension of it, it is not to be distinguished from the case of marriage brocage bonds, and it seems very necessary for the defendant to get rid of the authority of those cases. The present objection arises out of a confusion between a right to support a suit, and the ground of relief in that suit. The right to support the suit must be in some person directly or indirectly interested in the subject. As in the case of a bond, the obligor or his administrator might bring suit to get rid of the bond, and so might his creditor, for the creditor has an obvious interest by a medium that is sufficient for this purpose; but because there is such an interest belonging to the party as to entitle him to sue, it does not follow that an objection can be raised for want of him as a party to the suit. In the present case if any settlement had been touched by payment of the bond in question, the trustees would have had an *interest*, and would have had a right to relief; such a case intrenches so much on marriage provisions, that for the sake of public convenience, this is considered as such a vice in the contract as to put an end to the effect of the bond. The feelings of a parent and his affection for a child may be much interested in the provision to be made for her on marriage, and it is a great outrage on those feelings if the party be deceived in that respect. But these grounds are too slight to be made the ground of legal relief. The parent therefore is a proper person to prove the right of the child to be relieved on the score of *public policy*. The parent seems to have no such interest as to complain on legal grounds; and I think it is too much to admit (what the plaintiff's counsel seem inclined to do) that the parent alone can sustain the suit. In many cases probably the parent might have some other interest as a trustee, &c. but otherwise I think it impossible to say that the parent can alone sue; the interest is altogether in other persons, and though the misrepresentation is made to him, yet the fraud is on the marriage and those who claim under it. If this opinion, that the father is a proper witness upon

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this occasion, is a wrong one, it must be objected to by going so far as to shew that the father alone has an interest in the suit.

Hotham, Baron, said the party most interested was before the Court, and whatever length the cases had gone in giving to the parent an interest to sue if he thought fit, he was clearly of opinion the parent could have no such interest as to make him a necessary party.

Perryn, Baron, and *Thompson, Baron,* declared themselves of the same opinion.

The evidence of Morgan Davis was then read, which was to the following effect: "That about the latter end of "the month of April 1782, the plaintiff William made his "first application to the deponent to solicit his consent to "marry his daughter the plaintiff Elizabeth, in answer to "which application the deponent told him that he would not "give his consent to such marriage unless there was an estate "made to her for a settlement, upon which William Scott "desired him to apply to his mother the defendant; in "consequence of which request the deponent went soon "afterwards to the house of the defendant, and on the "subject of the said intended marriage being discoursed of, "the deponent told the defendant *that he would never give* "*his consent for her son to marry his daughter,* unless she "had a sufficient estate made to her in settlement; that the "defendant then told him there was an estate which her "son could make to his daughter, and that if he would "please to call again she should be able to give a further "account of it; that in consequence of such request he went "again to the defendant's house, when the defendant in "presence of Mr. John Roberts her attorney, and also the "said Mr. Roberts informed him that there was a lease-"hold estate in Dorsetshire which could be made as "a settlement to his daughter, which they said was worth "between 50*l.* and 55*l. per annum,* and that the plaintiff "William had also the stock on the farm he rented of a "Mr. Grove, which leasehold estate and stock appeared "upon reviewing the same to be worth fourteen or fifteen

"hundred pounds, and upon the defendant's observing "that that was not a fortune adequate to his daughter's "fortune, which amounted to the value of 1300*l.*, the "defendant and Mr. Roberts then told him that there was "a little estate at Berwick, in the county of Wilts, which "belonged to her son; and that there was also another "leasehold estate in the same county worth about 60*l.* per "annum, which her son would be entitled to after her the "said defendant's decease, and if the said marriage should "take effect he might put another life into it; in reply to "which proposals the deponent said, that if he did accept "them *on behalf of his daughter*, he hoped that the said "William Scott owed nothing on bills, bonds, or notes of "hand to any man or woman living, upon which the de- "fendant solemnly assured him that her son William "did not owe any such debts; that upon such her word "and promise he agreed to accept her proposals of such "settlement to be made on the marriage of her son with "his daughter." The deponent then stated another conversation with the defendant on the 24th of June following, when she repeated to him her assurances that her son owed no such debts. He then stated that on the last day of July 1782, the said Mr. Roberts came to his house with the deeds he had prepared for carrying the said marriage contract into execution, and that on the morning following previous to the execution of the said deeds he said to the said Mr. Roberts, "Now you have brought these "deeds, yet if you know of any money due on bills, bonds, "or notes of hand from the said William Scott to any man "or woman living, there shall be nothing done, for I will "not sign them;" to which Mr. Roberts replied, there was nothing due to his knowledge from the said William Scott to any person or persons whatsoever on bills, notes, or bonds, for that as he, the said Roberts, transacted all business for Mrs. Scott and her son, if there was any such thing he must know it, and at the same time he laid his hand upon his breast, and said he should be the vilest man in the world if he knew of any such thing and should

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conceal it to delude him; and in consideration of such assurances the said writings were executed, and the said marriage was solemnized on the first of October following.

Mary Davis, wife of the said Morgan Davis, and John Davis their son, were also examined, and swore very particularly as to repeated assurances by the said John Roberts, that the said William Scott owed no debts. Mr. Roberts was also examined by both parties, and denied having made any such assurances respecting the circumstances of the plaintiff William Scott; that he well knew that the said plaintiff was not only indebted to his mother in the 1000*l.* on bond, but also to his sister and her husband Mr. Phelps in a sum of 1100*l.* but he thought it his duty as an attorney not to divulge the secrets of his clients, and he therefore concealed from Morgan Davis the fact of the existence of such debts.

On this evidence the counsel for the plaintiffs argued that this was a case in which the Court would give relief by cancelling the bond in question, the defendant having thought fit on the occasion of the treaty of marriage to represent the obligor as not owing such debt; that the rule of law had long since been established in Courts of Equity, that where a party made such a representation on a subject which was an article of contract on marriage, such person should be bound to make good such representation, or at least should not be allowed to sue at law or in equity so as to defeat or diminish the value of the subject so represented. This principle prevailed in *Neville* v. *Wilkinson*, in 1782. *Gale* v. *Lindo*, 1 *Vern.* 475. *Redman* v. *Redman*, 1 *Vern.* 348. *Montfiori* v. *Montfiori*, 1 *Bla.* 363. In this case nothing could be more pointed than the evidence of Morgan Davis as to the stipulation he made on the marriage on behalf of his daughter, and the assurances made by the defendant in answer to those stipulations, and as far as Roberts's conduct is concerned, the testimony of Morgan Davis is confirmed by two other witnesses.

For the defendant it was said, there was no case to be found in the books where a debt contracted for a valuable con-

sideration, had been held to be cancelled even by a *fraudulent* concealment in the course of a negociation for a marriage: and then the question arises whether the cases in which relief has been given, establish in *principle* that such a concealment of a *bonâ fide* debt shall be tantamount to a vice in the original contract. At the same time perhaps it will be difficult to maintain, but that there may be such circumstances under which the concealment of a debt existing before the negociation for the marriage may be sufficient to annul the debt, though no case has actually decided it; but then it must be seen what circumstances are sufficient for this purpose, and whether such circumstances are proved in this case, or whether the Court will not at least direct a farther inquiry. Marriage brocage bonds so far differ from the present case, that they are securities given in the *course of the negociation*, and without any good consideration; perhaps the principle of public policy which has guided the decisions on marriage brocage bonds may be extended properly to this sort of case under *some* circumstances, but it will be material to consider what circumstances are sufficient for this purpose. In *Redman* v. *Redman*, 1 *Vern.* 348, it appears from the Register Book, though not so reported, that a creditor was co-plaintiff with the administratrix of Charles Redman, which makes some difference in the shape in which that case came before the Court, though perhaps it will be difficult to say, what equity the creditor could have which the administratrix would not. However it is sufficient to observe in that case, that the bond was without good consideration, and given in the course of the negociation. The same observation applies to *Gale* v. *Lindo*, for in that case there was no debt for valuable consideration subsisting before the treaty of marriage, but the bond in question was given in the course of the treaty. So in *Montefiori* v. *Montefiori*, *Bla. Rep.* 363, the note was given upon the occasion of the treaty of marriage, and in direct fraud of it, without the existence of any real consideration. As to *Harrison* v. *Thompson*, the *decision* in that case turned

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upon the release of the trustee, and therefore cannot apply to this case, though what fell from the *Lord Chancellor* does in some measure bear upon it; but then his Lordship distinctly said that he could not see any principle upon which the assertion of the trustee could be made to bind the plaintiff, which is material to decide how far the assertions of Roberts can have any influence on this point. *Neville* v. *Wilkinson* is what applies more strongly than any other case; for it must be admitted that the *Lord Chancellor* gave his opinion in that case very clearly and decidedly, and after much discussion, and he was so well satisfied on the subject that he did not order the money into Court; still however it has only the weight of an interlocutory order on a motion for an injunction on the hearing of the cause.

The next consideration is, whether the principles to be found in any of the cases are so positive and explicit as to be able to bind the decision of this case, and to induce the Court to say that the concealment of a real *bonâ fide* debt existing before the treaty shall be tantamount to a vice in the original contract. We admit that there may be circumstances under which the concealment of an actual existing debt would have such an effect; but it is to be seen what those circumstances are. We contend that it is not only necessary to make out that there was an intentional deceit on the one side by the concealment in the course of the negociation; but that, on the other, such concealment had an actual effect and a manifest influence on the contract, and therefore if the party attempted to be imposed upon was in truth aware of the deceit, and not in fact misled by the misrepresentation, the principle of the other cases will not apply; for which reason in *Neville* v. *Wilkinson*, Mr. Atkinson was called upon to declare whether he was not aware of the amount of Wilkinson's demand on Neville, with a view of determining whether the case of a party, aware of the deceit attempted to be imposed upon him, was not distinct from that of a party actually deceived. Where the party be not in truth deceived, he never can be considered as acting on the

faith of the subject misrepresented; and if so, there can be no principle which can bind the party to make good his representations, if on the other side, the contract has not proceeded on the idea of the truth of such representations.

In this case if the Court should think that Morgan Davis did actually know of the existence of this bond, and consequently was not misled by the representations of the defendant, although the defendant might intend to mislead them, what would be the consequence of the Court deciding, that notwithstanding such knowledge the defendant should be bound to substantiate what she represented? Davis, and the wife and son might collude to cheat the defendant, and notwithstanding actual proof of their being all apprized of the real circumstances of the party, the defendant might be drawn in to conceal the debt, and then be bound to make good what the other parties had never been deceived about. In this case there is very strong reason to suppose that the wife's family did know of the existence of this debt. This is a case where the defendant very distinctly and positively denies the fraud, and there is only the testimony of Morgan Davis to contradict her answer; for Roberts denies that he acted by the direction of the defendant, and therefore according to *Harrison* v. *Thompson*, no third person can without the privity of the party make such a representation as shall impeach the transaction on the ground of fraud. The words in which the question was put to Mrs. Scott, according to the depositions, "whether the son owed any debt on bond or note to any man or woman living," are very singular, and seem calculated to apply particularly to the case in question, and to proceed from some previous knowledge or intimation of the existence of such a bond. Morgan Davis does not once take upon himself to swear that he was altogether ignorant of the existence of the bond, and from the singularity of the inquiries there is every reason to believe that he was not so. If this be so, then we contend that no principle is to

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be found upon which this case can be decided against the defendant, and that the principle of public policy does not go so far as to say, that the one party shall make good their representation, if in truth the other party be not deceived, and consequently the contract cannot be founded on the faith of such representation.

Lord Chief Baron.—If the Court should consider the consequence to be clear, provided the facts of this case were with the plaintiff, I should think it very proper to have those facts sufficiently ascertained, and to direct an issue in case they did not already appear by the evidence in the cause. At the beginning of this cause I thought the question to be a new one. I thought that the cases on marriage brocage bonds had proceeded on the vice in the original contract, and that such vice had been deduced from the public inconvenience of such bonds making part of a treaty on marriage. It appeared to me that the other cases, where underhand bonds were given for the return of a part of the nominal portion, all went on the same ground, and that relief was given also in them on the vice in the *original* contract, though such vice arose from other principles than the former, namely, in respect of the fraud on some parts of the marriage contract, which was thereby prevented from having its full and entire effect. These two cases stand in different views; for in the case of marriage brocage bonds, the Court relieves without considering whether any settlement, &c. is affected by them or not; but the other cases are considered as fraudulent as being in prejudice to some interest derived under the marriage agreement, as the returning a part of the marriage portion; for there the portion agreed upon does not in fact exist, and the Court restores the thing stipulated for. And *Neville* v. *Wilkinson* must have gone on that idea, for the trustees in the marriage settlement were there parties, and Wilkinson's debt directly affected that trust, since the trust fund would be thereby rendered insufficient, and I can therefore easily see why the Court should take jurisdiction of such a case: but it seems to be a new question whether

on the ground of mere misrepresentation which does not appear to have had any direct effect in the treaty, but only on the general tendency, and general immorality of such conduct, the same relief can be given; this, I say, seems a new and a different question, and the other cases which have been decided do not touch this, being all either cases of marriage brocage, or considered as impugning some part of the marriage agreement, and infringing some interest derived under it. Viewing it so, I was not inclined to extend relief to a case circumstanced like this. Here the debt was a fair one, and the mother was fully entitled to what was made the consideration of the bond, and some reasonable objections have been made to the manner in which the case has been proved on the part of the plaintiff. *Now* I think this case comes very near in principle to those in which the Court has exercised a general jurisdiction over such fraudulent conduct as must necessarily have an effect on the marriage contract: for the outline of the case is this: The son, being in the separate possession of the leasehold estate and the stock, and appearing to be the proprietor of them, proposing himself to the daughter in the way of marriage, first treats with the father; if the father had given the portion, he would have treated in a great measure for himself, but taking it he treats for his daughter, he states his daughter will have a certain fortune. The son refers him to his mother, and they accordingly meet; if the evidence is true the mother represented to the father the property of the son to be both the leasehold estate, and the stock; (and to the father it must have been a very material circumstance that the son was the owner of this visible property, and this representation therefore becomes to be a very material fact in the case), if the father speaks true he fixes on the mother the declaration that the stock belonged to the son; the real fact is that there had been a settlement between the mother and the son, that the son should have the stock, and that he should pay his mother 1000*l.* there was probably also some provision for the daughter

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Mrs. Phelps, but this is not distinctly in evidence. In point of fairness the mother ought to have informed the father of this fact which affected the stock to the amount of one-third; nothing is so clear as that he was not told of it; and considering the nature of the inquiry it appears that he did wish to get at the fact; now this makes a vice in the original contract; for if it was once solemnly represented by the mother that the stock belonged to the son, she either had been satisfied for her interest in the stock, or she made a present of it to the son, and she therefore ought not to claim in diminution of this stock. If this view of the case is correct, it is within the cases which say that if there be a vice in the contract as operating in fraud of the marriage agreement, this shall be void. The circumstance of concealing the bond strengthens this, though not sufficient to be a ground of relief in itself, and it would rather loosen the principles of Courts of Equity if it were so determined. The cases in which the Courts have interfered have only gone to the length of postponing the securities and not of setting them aside, which shews they go on the ground of administering justice between the particular parties, and like the cases of fraudulent concealment of mortgages, where the question has arisen between the prior and the puisne incumbrancer, the relief is given only *quoad* the particular purpose before the Court. The question then will be, whether the case as stated is within the general jurisdiction of the Court, and then whether the facts of it are sufficiently clear on the evidence: if any part of the Court should entertain any doubt of the facts, it will be very proper to direct an inquiry into them, that is, whether the stock was represented by the mother to belong to the son, and whether after that she took from the son the security in question. As to Roberts's evidence, it is gross to say that a man does his duty to his client by asserting a falsehood; if he chose to hold his tongue he certainly might, but it never can be carried further. Upon the whole there is sufficient evi-

dence already in the cause to satisfy me of the facts, and that the bond was taken by the mother in fraud of the representation made by her to Davis, and on that ground I have no difficulty in decreeing for the plaintiff.

Hotham, Baron.—The circumstances of this case are not so suspicious as to make me doubt of the real fact. I cannot presume easily that the wife's family had a knowledge of the son's real circumstances. The possibility of the mother's being circumvented by the scheme of the other parties is hardly sufficient to make me alter this opinion. The father seems to have conducted the treaty with the greatest anxiety, and to have considered the circumstances of the son as a subject very serious. On public grounds I think such a gross deception should not have effect. It seems to me the father has been really imposed upon: and I am of opinion that the plaintiff is entitled to relief without directing any further inquiry.

Perryn, Baron.—I am sorry to differ from what I have heard from the other part of the Court, but I own the evidence is not satisfactory to me, and I cannot decide with the plaintiff as things now stand. The settlement made on the marriage ought to be produced, and we ought to see what that contains. There may very possibly be covenants in that which go to this very point, and shew a direct interest which will be infringed by this bond.

Thompson, Baron.—I am perfectly satisfied with the evidence in this cause, from which it appears that in reality the bond was industriously concealed by the mother during the whole of the negociation. It is fully proved by the father Mr. Davis, and in a great measure confirmed by his wife and son. As to the consequence of the fact (which I think is fully proved) the question is, whether the plaintiff is entitled to relief. It is not necessary to enter into the question how far the concealment of a bond, *originally* good, for the sake of drawing in the parties to the marriage, will vitiate the contract.

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It may not perhaps be in itself a sufficient ground for relief in a Court of Equity. But this is not the case of a mere concealment; here the contract was vicious in its creation. The first inquiry made by the wife's family was certainly before the bond was given, though thedebt did actually exist, being the consideration for the sale of the mother's interest in the stock; solemn assurances were given by the mother that no such debt existed; on the strength of this the father goes and examines the son's visible property, and thereupon and on the faith of this representation the marriage was had, and it is immaterial what settlement was made. In good faith the mother ought not to have suffered the son to have given the bond; it was in fraud of the contract entered into, and the concealment of the bond afterwards was a very great aggravation of this; for she certainly did wilfully conceal this bond. I will not determine whether the concealment in itself would have been sufficient, but I am clear that the bond here was vicious in its origin and in fraud of the marriage contract, and the plaintiff is therefore entitled to relief.

In consequence of the doubts expressed by *Perryn, Baron*, the Court directed an inquiry what stock was upon the premises, and in whose possession it was at the time of the treaty, and what was the consideration of the bond, and also what settlement was made on the marriage.

In the Exchequer. Lord Chief Baron Eyre, Barons Hotham, Perryn, Thompson. June 21, 1787.

GRIFFITH *versus* SPRATLEY.

Inadequacy of value is not *in itself* sufficient to set aside a contract.

This bill was filed by Owen Griffith against Thomas Spratley and James Hill to have certain deeds, whereby the plaintiff conveyed all his interest in some houses in Grub-street, to the defendant Spratley, delivered up to be cancelled as being obtained by fraud and misrepresentation; but as the plaintiff was not able to make out in evidence any positive circumstances of fraud, the cause was argued principally on the inadequacy of the consideration. In 1784 the plaintiff was entitled to two undivided third parts of a ground rent of 36*l.* per annum, issuing out of certain messuages situate in Grub-street and elsewhere, in the parish of Saint Giles's Cripplegate, which were formerly let to one Physick, for a term of years which would expire at Midsummer 1792, and also was seized in fee of the reversion of such two-thirds of the said premises, subject to the said term, and the said houses were then let to several persons at rents amounting together to the sum of 157*l.* per annum; but (according to defendant's answer) such yearly rents were subject to deductions for repairs and land tax, and the said houses were very old. The plaintiff was a sailor, and it was admitted by the defendant's answer and was otherwise in proof, that he was at that time in considerable distress for want of money. In these circumstances he applied to Spratley the defendant, who was a broker, and who occupied one of the houses in question, to buy his (the plaintiff's) interest in these houses, which Spratley agreed to do, and as a consideration for the same Spratley was to grant the plaintiff an annuity of 34*l.* for his life, which he represented to the plaintiff to be worth the sum of 400*l.* In consequence of this the defendant Hill about the latter end of October 1784, attended the plaintiff and defendant Spratley, and took their instruc-

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tions for an agreement in writing, which agreement was accordingly prepared, and was executed by plaintiff and Spratley, and was as follows: "Articles of agreement indented, had, made, concluded, and agreed upon this 1st "day of November 1784, between Owen Griffith of Deptford, in the county of Surrey, Mariner, and Thomas "Spratley, of Fore-street, in the city of London, Broker. "Whereas the said Owen Griffith is seized in fee simple, by virtue of the last will and testament of John "Gardner deceased, of and in two full third parts, the "whole in three equal parts to be divided, of and in fifteen "messuages, cottages, or tenements with their appurtenances, and the ground and the soil on which they stand, "situate in and near Grub-street, &c. and the said "Thomas Spratley hath agreed to and with the said Owen "Griffith, to purchase of him the said Owen Griffith, and "the said Owen Griffith doth hereby covenant, promise, "and agree to and with the said Thomas Spratley, his "heirs, executors, and administrators, that he the said "Owen Griffith, for the considerations hereinafter mentioned, shall and will with all convenient speed, being "thereto required by the said Thomas Spratley, make, do, "and execute a good and effectual conveyance in the "law of all his the said Owen Griffith's right and interest "in the said premises, in such manner and form and to "such effect, intent, and purpose, as shall be advised by the "counsel of the said Thomas Spratley, to hold the said "premises with their appurtenances, unto him the said "Thomas Spratley, his heirs, executors, administrators, "and assigns for ever: and the said Thomas Spratley, in "consideration of such conveyance and so soon as the "same shall be made and executed, doth hereby covenant, "promise, and agree to and with the said Owen Griffith, "that he the said Thomas Spratley, his heirs, &c. shall "and will as soon as he or they shall be required, make "and execute a good and effectual deed, grant, or other "conveyance in the law, of one clear yearly annuity or rent "charge of 31*l.* to be paid, issuing and payable out of the "same premises or by the said Thomas Spratley, his exe-

"cutors or administrators unto the said Owen Griffith or "such person or persons as he shall appoint, during the "life of the said Owen Griffith, and which annuity or "yearly sum of 34*l.* is the full consideration or purchase-"money agreed on between the said parties for the pre-"mises above-mentioned. And for the true and faithful "performance of each of the said covenants, articles, and "agreements each of the said parties, doth hereby bind "and oblige himself to the other of them in the penal "sum of 100*l.* of lawful money, &c. to be sued for in the "like manner as the penalty of a bond for the like sum, "Owen Griffith, Thomas Spratley."

By indentures of lease and release of the 3d and 4th of December 1784, the plaintiff conveyed all his interest in the said two-third parts of the said premises in pursuance of the said agreement to the defendant James Hill and his heirs upon trust, that the plaintiff should and might have and receive yearly, during the term of his natural life, one annual rent-charge, or sum of 34*l.* issuing and payable out of the said two-third parts of the said messuages or tenements, with the usual powers of entry and distress in case of non-payment; and subject thereto to the use of the said defendant Hill, for a term of 200 years, upon the trusts after mentioned, and subject thereto to the use of the defendant Spratley, his heirs and assigns for ever; and the trusts of the said term were then declared to be for the better securing the said rent charge to the plaintiff in manner therein mentioned.

The bill suggested that it was agreed between plaintiff and Spratley, that Spratley was not only to grant the annuity of 34*l.* but was also to pay a considerable sum of money in discharge of the plaintiff's debts as the consideration for the said premises; however this was denied by the answer, and the plaintiff was not able to make any proof of it; and on the other side it was proved by defendant Spratley that the deeds were carefully read over and explained to plaintiff, and that he signified his approbation of them. It was also agreed between them that the plaintiff should pay 16*l.* for the expenses of the said convey-

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ances. After this the plaintiff received 25*l.* on account of the annuity, but in Easter Term 1785 filed this bill to set aside the sale.

Two surveyors had been examined on each side to prove the value of the plaintiff's interest in the premises, at the time of sale. The first on the part of the plaintiff valued them at 1032*l.* the second at 869*l.* 8*s.* 8*d.* The first on part of the defendant valued them at 437*l.* and the second at 443*l.* Several other things were suggested on the part of the plaintiff as ingredients in his case; but as they were not in proof, the cause came on, on the circumstances above-mentioned.

It seemed agreed that the plaintiff must rest his case on the single ground of inadequacy of consideration, or the fraud to be presumed from that *alone*; and that in this point of view, the case of *Heathcote* v. *Paignion*, before the *Master of the Rolls*, and afterwards on appeal before the *Lord Chancellor*, was the only one in point; and the argument therefore principally turned on that case. For the plaintiff it was said that *Heathcote* v. *Paignion* was first determined by the *Master of the Rolls* upon great consideration and expressly on the ground of the bargain for the annuity being under the market price, and his Honour very explicitly declared his opinion, that that was a distinct and sufficient ground of relief in a Court of equity; and on appeal to the *Lord Chancellor*, his Honour's decree was affirmed, and his Lordship in his decree also takes notice of the bargain being much below the real value, and something below the market price. This therefore was a direct and weighty authority for the plaintiff. For the defendant it was answered, that though his Honour did certainly lay great stress upon the market price of annuities, yet when the cause came on before the *Lord Chancellor* upon appeal, his Lordship expressed great difficulty in determining any thing upon the market price as distinguished from the real value, and that he affirmed the decree on the fact appearing by the Master's report, which had never been excepted to, that the real value of the annuity was ten years purchase, and yet that it had been sold for four years pur-

chase; which was so very gross an under value as to be fully sufficient to raise the presumption of fraud; that it could not be disputed, but that many cases had determined that fraud might be presumed from the circumstance of inadequacy of consideration only, provided it were so very gross as to make it impossible to believe that a man was dealing as a free agent; that so the *Lord Chancellor* considered the case of *Heathcote* v. *Paignion*, taking the fact to be ascertained by the report, and though it certainly did appear that the words "market price" had crept into the decree, yet that certainly was not the ground of the decision on affirming the decree, as it was to be collected from what fell from his Lordship at that time; that in fact the market price of annuities is altogether an imaginary thing and cannot possibly exist. The value of annuities must depend upon a thousand circumstances, such as the health and age of the party, the delicacy which parties may feel in different degrees in such dealings; nay any cause upon this subject which is decided in Westminster Hall, may give a different value to annuities, as it may shake the security of such sort of bargains. Taking then *Heathcote* v. *Paignion* to have been decided upon the gross inadequacy appearing on the report, how does it touch this case Is there such a gross inadequacy as that fraud must necessarily be presumed from it? If the defendant's witnesses speak true, the defendant has given a fair value; but even suppose the plaintiff's witnesses to be more correct, the inadequacy is by no means such as to shake this deliberate bargain.

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In reply it was urged, that if from the different opinions of the surveyors the Court had doubts about the value of the premises, and as the case had been principally argued upon that circumstance, it would be proper to have that fact ascertained, either by an issue or a reference to the proper offices.

Lord Chief Baron—The plaintiff, if he has merits on his side, is unfortunate in the way in which he has been forced to bring on this cause. No wonder his case is imperfect, for unfortunately the truth is entirely in the heads

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of the defendants, and the plaintiff cannot get at it, but from their discovery. However, there is sufficient to shew that the defendant's case is not free from suspicion. Here is a sailor in distressed circumstances and oppressed by his creditors, dealing with a broker *living on the estate*, and understanding the value of it, contracting for something which could not relieve him from his creditors, though it would increase his annual income: and it is clear the annuity was not *quite* equal to the value of the premises sold, and the plaintiff is at the same time loaded with all the expenses of the conveyances, and the title deeds are left with his opponent's agent. Under these circumstances one cannot help examining with jealousy such a transaction; and I could have wished to have found a ground for giving relief to the plaintiff, if I could have done it without establishing principles which would shake the commercial intercourse of the nation. But the case is a case of suspicion only. Here is a sailor, who appears to be very poor, offering to a broker to sell his estate; and now on these circumstances alone, it is very difficult to apply any known principle of equity on which relief can be given; but the case has been much rested upon this, that the satisfaction received is so grossly inadequate to the real value, that it is impossible to resist the inference of fraud, which arises on that inadequacy; or, if possible, to make inadequacy of consideration of itself a distinct principle of relief in equity; but I know of no such principle: the common law knows no such. The consideration more or less supports the contract. Common sense knows no such principle. The value of a thing is what it will produce, and admits of no precise standard. It must be in its nature fluctuating, and will depend upon ten thousand different circumstances. One man in the disposal of his property may sell it for less than another would; he may sell it under a pressure of circumstances, which may induce him to sell it at a particular time. Now if Courts of Equity are to unravel all these transactions, they would throw every thing into confusion and set afloat all the contracts of mankind. Therefore I never can agree

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that inadequacy of consideration is *in itself a principle* upon which a party may be relieved from a contract, which he has wittingly and willingly entered into. It may indeed be a strong *evidence* of fraud, when the transaction is such as to be inconsistent with the sober manner of a man's conducting his affairs. When you see distress on the one side and money on the other, and a wish on the one side to press that distress into a submission to his own terms, inadequacy of price goes a great way in warranting the court to infer from this, that some sort of fraud was used to draw the other party into the bargain; it may be such an ingredient of fraud as to make the Court presume more than is in actual proof; and I shall never quarrel with a Court of Equity which makes such an inference, where the inadequacy is so gross, as makes it impossible that the bargain could have been fairly made. And I therefore cannot take upon me to call in question the determination in *Heathcote* v. *Paignion*, for taking the fact to be ascertained by the master, that an annuity worth ten years purchase, sold for only four, one's mind revolts at such a conduct, and nobody can suppose such a bargain to be made by a man in possession of himself; besides which the party appeared to be necessitous from other circumstances. He had borrowed 100*l.* and had been refused 200*l.* afterwards; it was difficult therefore for him to refuse any terms that were offered him, and from this it may be inferred that an advantage was taken of his necessity. At the same time I must confess I do not enter into the grounds of the calculation by which the value in that case was ascertained; for, after all, if the actuary of the Amicable Society will extract from the tables, that an annuity for the life of the seller, is worth twelve years purchase, and yet no one man is to be found at the stock exchange who will give more than six, and on and before and after the time of the contract, the sense of mankind, evidenced by their transactions, is, that such an annuity is not worth more; I cannot conceive how the Master drew the inference he did. However as it stands on the report, I must

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take it so, and then the inadequacy is very gross indeed. Then can the doctrine of that case *so stated* be applied to this? It appears from the evidence that the value of the annuity was not quite equal to the value of the premises sold; but if the defendant's witnesses are right, it was not far short. I think it laid on the plaintiff to make out to the satisfaction of the Court, that the value was so inadequate as to be within the reach of *Heathcote* v. *Paignion*. So far from it that he has examined two witnesses who differ to the extent of a fourth, which shews how uncertain their medium of calculation must be, and this uncertainty is still more obvious and glaring by the different opinions of the witnesses on the part of the defendant; for they are all of equal skill and integrity, and yet they honestly differ to the extent of one third; if so, why may not buyers and sellers do so too without any just imputation of palpable gross intended fraud. I do not see how it is practicable to draw such a line of fraud, as to shew this price grossly inadequate, or how to take measure of an annuity valued at 400*l.* and compare it with the value of the premises sold, so as to infer an undue advantage, (which implies intention) taken of the necessities of a man, such as to authorize the Court to relieve on the ground of fraud and imposition. It is proposed to put the cause in a course of further inquiry; but if we do, there will be ten surveyors on each side instead of two, and they will differ as much as these do, and the Master must draw a conclusion from the same facts as we have before us, or else he will leave it again for the Court to do. We might indeed direct an issue, and to be sure a jury might cut the knot; but they would not be more capable than we are of drawing from the evidence any settled precise idea of the value; and even if they should, it is not probable, that the measure of inadequacy should turn out to be such as to be sufficient to set aside the contract. Upon the whole therefore I think the plaintiff has not made out a case on which the Court can give him relief, and it would only add to his expenses to make any further reference. At the same

time I think he had some probable ground for coming here, and therefore that the bill should be dismissed without costs. *Griffith v. Spratley.*

Hotham, Baron.—I agree that this bill ought to be dismissed without costs. Inadequacy of value can never be sufficient, when naked and unattended with other circumstances, to set aside a contract; there are many cases in which it is prudent and advisable for a party to buy a thing at more than its real value, as if there was a piece of ground in the middle of a park, which the owner wished to purchase. At the same time there may be cases where it is sufficient to amount to a proof of fraud; but then it must be glaring and gross; but here the plaintiff was the first actor and asked only for the annuity.

Perryn, Baron.—I am of the same opinion. I am very clear that inadequacy alone is no ground of relief.

Thompson, Baron, declared himself of the same opinion,

ALEXANDER *versus* M'CULLOCK.

In Linc. Inn Hall, Lord Chancellor. July 19, 1787.

ON FURTHER DIRECTIONS.

Devise.

The testator in this cause, by his will gave directions in these words, "I order that a fund may be lodged with J. "Brown, of Glasgow, so as to raise 48*l.* per annum, for "the support of J. H.'s children, to be paid them from "time to time as their necessities require, without any "regard to their father or mother."

Lord Chancellor said, he thought it probable, the testator might mean this allowance to take place only during the minority of the children; but that upon the words he had made use of, it was impossible to restrain it to any thing short of a life interest,

BAILLIE *versus* BUTTERFIELD.

At the Rolls, Sir Lloyd Kenyon. July 19, 1787.

BY CONSENT.

Legacies when cumulative.
1. The same legacy given by *different instruments*, shall be *cumulative*.
2. Probate being granted as of a *will* and *codicil*, is conclusive as to the fact of their being *distinct* instruments.

Thomas Baillie made his will, dated the 5th of January 1779, in these words, "I Thomas Baillie, &c. do make "this my last will and testament. As to all my worldly "estate and effects of which I may die possessed, I do give "and bequeath to my adopted son Edward Butterfield, a "son to the late Captain Butterfield, deceased, upon his "attaining the age of 19 years; but in case of his demise "before that period, then to my dearly beloved brother "John Baillie and to my two sisters to be equally divided "amongst them, share and share alike; and at this "present time agreeable to my fortune I leave 500*l.* to "each; and I hereby nominate and appoint Major Peter "Duff, Henry Grant, and William Paxton, in the town "of Calcutta, my true and lawful executors." This will was published by the testator in the presence of two witnesses.

Upon the same paper under this will, there appeared to be written, in the testator's hand writing, as follows: "I "also say my brother 500*l.* and my two sisters 1000*l.* be-"tween them, Thomas Baillie." It did not appear when this was written, nor was there any circumstance in proof relating to it. But in the ecclesiastical Court probate was granted of these two writings as a will and codicil.

The bill was filed by the brother and two sisters, claiming to be entitled to double legacies, that is, 500*l.* each by the will, and 500*l.* each by the codicil; and the question was whether they were so entitled.

For the defendant Edward Butterfield it was argued, that they should be entitled to one legacy only; that the second writing was only meant as explanatory of the former bequest, which was uncertain, inasmuch as it might be doubted, whether the words "500*l.* to each," might

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not extend to Edward Butterfield, by giving him an immediate interest in 500*l.*, at least so the testator might think; that in the second writing there were no words of gift; the cases on double legacies are where there have been words of gift in each instrument. No reason is in evidence why double legacies should be given by the testator, no proof of any additional fortune, and the same quantity precisely is given. In *Hooly* v. *Hatton* the legacies were of different quantity, and in *Ridges* v. *Morrison.* 1 *Bro. Cha. Rep.* particular circumstances were expressed as a reason for the addition. It is clear that if the two writings can be considered as the same instrument, the legacies would not be accumulative; and it seems, that these few words subjoined without any fresh attestation, or any words of gift, can only be considered as explanatory of the former.

Baillie v. *Butterfield.*

But his Honour considered the probate granted by the Ecclesiastical Court as conclusive to shew, they must be taken as distinct instruments, and in that case the rule was, that the legacies are to be taken as accumulative, and consequently that in this case the plaintiffs were respectively entitled to their double legacies of 500*l.*

EX PARTE LEE.

In Lincoln's Inn Hall, Lord Chancellor. July 1787.

PETITION IN BANKRUPTCY.

This petition stated that in April 1782, a commission issued on the petition of four petitioning creditors, whose debts in fact amounted to 200*l.* and upwards, and the commission had proceeded to this time; but that on a trial at law, in which it was necessary to produce the proceedings under the commission, it was discovered that there was a mistake both in the original petition and the commission, by leaving out the name of one of the four petitioning creditors, and also by inserting the amount of the debts as

A commission cannot be altered although it is evident that there has been a clerical error in the office.

Ex parte Lee.

being 100*l.* and upwards, instead of 200*l.* and upwards; that this was a mistake of one of the clerks of the then Secretary of bankrupts; and therefore the petition prayed, that the original petition and commission might be amended, by inserting the name of the fourth petitioning creditor, and by altering the amount of the debts.

But the *Lord Chancellor* said, though this is an evident mistake, and a very hard case, yet it was out of all sight to alter the commission.

In Linc. Inn Hall. Lord Chancellor. July 1787.

EX PARTE MASKELYN.

PETITION IN BANKRUPTCY.

A. drew bills to the amount of 3000*l.* on B. which were indorsed by C. without any consideration: all the parties became bankrupts, at which time C. was indebted to A. on a distinct account in 2000*l.* The assignees of A. proved the debt of 2000*l.* under C.'s commission, and the several holders of the bills also proved the amount under C.'s commission, and received a dividend of 8*s.* in the

This was the petition of John Maskelyn and others, assignees of the estate of James Williams the bankrupt. It stated, that for several years before the year 1780, Griffith Maskelyn then of Bristol, merchant, in order to raise money draws bills of exchange on Peter Warren, of London, who accepted the same, and thereby enabled the said Maskelyn to negociate and discount the same, and to raise money thereon; until the person in Bristol by whom such bills were discounted, refused any longer to have any concern with or to advance any money thereon: that some time in the year 1781, for the first time, the said Maskelyn persuaded and prevailed upon the bankrupt James Williams, (who had for several years then before been clerk to the said Maskelyn, and had succeeded to some part of his trade, and was at that time considerably indebted to the said Maskelyn,) to assist the said Maskelyn in raising money upon the said bills, and to give an additional credit thereto by indorsing the same, and that from that time and for the space of three years or thereabouts then next ensuing, the said bankrupt James Williams continued in the habit of indorsing the said bills of exchange so drawn by

Ex parte Maskelyn.

the said Maskelyn upon and accepted by the said Peter Warren, and in negociating them and raising money thereon, for the use and benefit of the said Maskelyn, through various channels and by different means, without receiving any valuable consideration whatever for his indorsements of such bills, or any benefit or advantage from the negociation or discount thereof: that in November 1784 Maskelyn became a bankrupt, and soon afterwards in the latter end of November 1784, the commission issued against James Williams, and in December 1784 a commission issued also against Peter Warren: that at the time of the bankruptcy of James Williams, there were bills circulating drawn by the said Maskelyn upon and accepted by Peter Warren, with his the said James Williams's indorsements thereon, to the amount of 3000*l.* in the whole, for or by means of which indorsements the said James Williams had not received any benefit or consideration whatever, and James Williams was at this time indebted to the estate of Maskelyn in the sum of 2000*l.* upon the balance of the account then depending between Maskelyn and Williams, independent of and entirely unconnected with the said bill negociation, that Williams had so engaged in; that the several holders of the said bills, which were in circulation at the time of the bankruptcy of Williams, had since that time proved their respective debts in respect of such bills, to the amount of 3000*l.* in the whole, under Williams's commission, and the assignees of Maskelyn had also proved the said debt of 2000*l.* under Williams's commission; that a dividend of 8*s.* in the pound, had lately been made under Williams's commission, and the said several bill-holders or the greatest part of them had received, or were then entitled to receive the said dividend of 8*s.* in the pound, upon the said several bills, to the amount of 1200*l.* in the whole; that the assignees of Maskelyn had claimed a dividend of 8*s.* in the pound on the said debt of 2000*l.* proved by them under Williams's commission as aforesaid; that the petitioners the assignees of Williams were unable to prove any debt under the commission against Maskelyn, on account of the said bills, inasmuch as no debt had ac-

pound. The Court directed the assignees of C. to retain the dividend on the said proof of 2000*l.* for the benefit of the general creditors, and expunged the proof of the said 2000*l.*

Ex parte Maskelyn.

tually accrued in respect thereof at the time of issuing out the said last mentioned commission, or of the act of bankruptcy on which the same was founded; nor were the petitioners able to refuse or repel the claims of the said several bill-holders upon the effects of Williams, and therefore the petitioners apprehended, that the creditors of Maskelyn would receive an undue advantage, as they would receive the full benefit of the dividend which was and might be declared due on the said debt of 2000*l.* so proved by the assignees of Maskelyn under Williams's commission, and were not to make any allowance for the benefit which the estate of Maskelyn had already received, and might thereafter receive, by the satisfaction of the said several bill-holders to the amount of 3000*l.* in the whole. The petitioners therefore submitted that under the circumstances of this case they ought to be permitted to retain the dividend due and to accrue due to the assignees of Maskelyn in respect of their said debt of 2000*l.* proved by them against the estate of Williams, and to divide the same amongst the other creditors of Williams by way of set-off, and as some satisfaction for the benefit and advantage which the estate of Maskelyn had received, or might receive, from the estate of Williams, by reason of his said endorsements of the said bills so drawn by the said Maskelyn upon, and accepted by, the said Peter Warren as aforesaid, without ever having received any consideration for, or benefit from, such endorsements; the petitioners therefore prayed, that the petitioners might be permitted to retain in their hands, and divide among the other creditors of Maskelyn, the dividend due and to accrue due upon the said debt of 2000l. proved under Williams's commission by the assignees of Maskelyn.

After some little argument the *Lord Chancellor* declared himself to be clearly of opinion, that the petitioners should have the relief they sought, and directed the debt of 2000*l.* to be expunged.

EX PARTE HARDCASTLE.

In Linc. Inn. Hall, Lord Chancellor. July 1787.

PETITION IN BANKRUPTCY.

A separate commission of bankruptcy superseded in order to give effect to a joint commission taken out afterwards.

In this case a separate commission had been taken out against one partner in April, and a joint commission on the 3d of May following. This petition preferred by the joint creditors prayed that the separate commission might be superseded.

The *Lord Chancellor* said, he often entertained great doubts about the legal effect of taking out a joint commission while a separate commission was in existence, for he did not conceive how a man could be made bankrupt twice over, or how the interest in the joint fund, which the separate bankrupt had, and which consequently on his bankruptcy vested in his assignees, was afterwards to be transferred to the joint assignees. However the inconvenience of taking out separate commissions, where joint commissions afterwards became necessary, would in this case be so enormous, that he was determined to supersede separate commissions under such circumstances. And his Lordship pronounced the order that the separate commission should be superseded, but the separate assignees were to have all the expenses of the separate commission, and all the expenses of this application, it being the first instance of such an order. The separate creditors to be at liberty to prove under the joint commission and separate accounts to be kept in the usual manner.

RYAN *versus* STEUART.

In Linc. Inn Hall. Lord Chancellor. Oct. 30, 1787.

After an undertaking to speed a cause, the plaintiff cannot *as of course* obtain

After undertaking to speed the cause the plaintiff moved as of course, and obtained an order, to withdraw his replication and amend his bill. It was now moved on the part of the defendant to discharge this order for irregularity.

Ryan v. *Steuart.*

an order to withdraw his replication and amend his bill.

Lord Chancellor.—This order obtained by the plaintiff can never be a motion of course; though possibly it might be allowed, if he made out some special case for the purpose. It is a most unreasonable practice, if it ever had any foundation; and I shall therefore discharge the order.

In Linc. Inn Hall, Lord Chancellor. Nov. 5, 1787.

EXPARTE BLAKES.

PETITION IN BANKRUPTCY.

The Court cannot compel a bankrupt to execute to them an assignment of debts due to him in America, though the American Government will not take notice of the rights of the assignees under the bankrupt laws of this country.

This petition prayed that the bankrupt might assign to his assignees certain debts due to him in North America, or might execute a power of attorney to them to receive the same, upon affidavits that the debtors in America refused to take notice of the interest of the assignees under our bankrupt laws, or to pay the debts without an actual assignment or power of attorney from the creditor.

Lord Chancellor.—My difficulty in making such an order as is now prayed against the bankrupt is this, namely, that if he refuses, I must commit him; and yet in the contemplation of our law, the very instrument he is required to execute is of no effect. It might be a good thing for the legislature to direct in such cases, but I doubt whether I can. I had no idea of any country refusing to take notice of the rights of the assignees under our laws, and I believe every country on earth would do it besides; but if they will not, I really do not see how I can order it. There are many compulsory remedies expressly given by the bankrupt laws, which otherwise the Court could not give, nor could the assignees effect.

THOMAS *versus* ARCHBISHOP OF CANTERBURY.

In Chancery, Lord Thurlow. Nov. 10, 1787.

Iltyd Thomas died on 14th November 1785, intestate, and on the 14th day of January 1786, the plaintiff Mayzod Thomas his widow obtained letters of administration of his personal estate and effects from the Prerogative Court of Canterbury, and the plaintiff with two other persons as her sureties, entered into the usual bond to the Archbishop in the penal sum of 2500*l.* with condition, if the plaintiff did make or cause to be made a true and perfect inventory of all and singular the goods, chattels, and credits of the said Iltyd Thomas, which had or should come to the hands, possession, or knowledge of the plaintiff, or to the hands, possession, or knowledge of any other person or persons for her use, and the same so made *should exhibit or cause to be exhibited into the Prerogative Court of the Archbishop of Canterbury at or before the last day of June then next*, and the same goods, chattels, and credits, and all other the goods, chattels, and credits of the said Iltyd Thomas deceased, at the time of his death, which at any time after should come to the hands or possession of the plaintiff, or the hands or possession of any other person or persons for her do well and truly administer according to law, and further should make or cause to be made a true and just account of her administration at or before the last day of December 1786, and all the rest and residue of the goods, chattels, and credits which should be found remaining upon the same administration account, the same being first examined and allowed of by the Judge or Judges for the time being of the Court, should pay and deliver to such person or persons respectively as the said Judge or Judges by his or their decree or sentence pursuant to the intent and meaning of an act of parliament, entitled "An Act for the better settling Intestate Estates," should limit and appoint; and if it should thereafter appear that any last

An administratrix entered into the usual bond in the Prerogative Court to exhibit an inventory within a limited time, &c. The time having elapsed without an inventory being exhibited, a creditor put the bond in suit in the name of the Archbishop.

The administratrix filed her bill for an injunction, which was granted on the terms of her giving judgment in the action which was to *stand as a security for the Costs at Law and in Equity* (but not for the debt), and amending the bill by submitting to account.

Thomas v. *Archbishop of Canterbury.*

will and testament was made by the said Iltyd Thomas deceased, and the executor or executors therein named should deliver the same into the said Court making request to have it allowed and approved accordingly, and plaintiff being thereunto required should render and deliver the said letters of admininstration, approbation of such testament being first had and made in the said Court, then the said obligation to be void and of none effect.

The plaintiff did not exhibit the inventory on or before the last day of June, according to the terms of the said bond; but did actually exhibit an inventory into the Registry of the said Court on the 6th day of July following. The bond being thus forfeited, Robert Morris, a judgment creditor of the intestate for 54*l.* 18*s.* 6*d.* obtained a copy of the bond, and commenced an action upon it against the plaintiff in the name of the Archbishop, but had no assignment of the bond or any permisson from the Archbishop so to do.

The plaintiff filed the bill stating these matters, and that the inventory was not exhibited within the limited time by reason of the embarrassed state of the intestate's affairs, and praying that the defendants the Archbishop of Canterbury and the said Robert Morris might be restrained by injunction from proceeding in the said action.

The defendants answer being come in, *Richards*, on the part of the plaintiff, moved for an injunction on the second seal before the term, and it was mentioned to the Court on two or three subsequent days; and on the part of the plaintiff it was said that this Court would relieve against the penalty of the bond, making it a security *only* for the costs of the creditors in law and equity, and not for the *debt*, and a case of *Johnson* v. *Lawrence*, in the Exchequer in 1768, was cited for this purpose.

Lord Chancellor at first had doubts about the propriety of this Court interfering in a matter which seemed altogether of spiritual cognizance, and thought that upon application to the Spiritual Court, the Archbishop would not permit the action to be brought in his name, if the executor could

make out any case to shew that he was not culpable. But it appeared by the cases mentioned, that the temporal Courts had interfered on these occasions.

But it was argued by *King*, for the defendant Morris, that this Court would not relieve by injunction, but upon the terms of making the bond a security for the *debt* as well as the costs of the creditor, and cited *Greenside* v. *Benson*, 3 *Atk.* 248, as deciding this, in which (according to the report) Lord *Hardwicke* ordered an account to be taken of what was exhibited on the inventory, and the verdict to stand as a security for so much as that should fall short to satisfy the defendant's *principal and interest on his bond.* That a creditor has a right to sue on the administration bond, appears by the *Archbishop of Canterbury* v. *House*, *Cowp.* 140.

On another day *King* mentioned to the Court that although *Greenside* v. *Benson*, as reported, appeared to be in point; yet he thought it right to mention that upon looking into the decree it appeared to be erroneously reported, and that in fact the Court there held the administration bond to be a security only for costs at law and in equity, and did not give the creditor any right of satisfaction on account of his debt out of the administration bond, but directed the personal estate to be applied for satisfaction of the debt and costs as far as it could extend, and then if deficient costs were to be paid by the administratrix to the extent of the penalty of the administration bond, but no further.

King also produced a decree made in the cause of *House* v. *Hardy* (in the same matter as *Archbishop of Canterbury* v. *House*) in Chancery, 18th May 1778, upon a suit there instituted by House for an injunction, and the injunction was there granted upon the same terms, and a similar decree made to that in *Greenside* v. *Benson*.

Whereupon in the principal case *Lord Chancellor* granted the injunction upon the plaintiff's giving judgment in the action, which was to stand as a security for the costs in law and equity, and amending the bill by submitting to account for the intestate's assets.

In the Exchequer. Lord Chief Baron, Barons Hotham, Perryn, Thompson.
Nov. 15, 1787.

DAVIS *versus* SYMONDS.

In what manner a *written* agreement may be *affected* by *parol* evidence. And upon what grounds the Court proceeds in admitting or rejecting such evidence.

It cannot be admitted for the purpose of *varying* the agreement, although it may for the purpose of raising an equity founded on the agreement, by proof of *collateral* circumstances.

A Court of Equity will exercise its *discretion* in cases of bills for specific performance by dismissing them (*and with costs*), although the *same circumstances* would not induce the Court to make a decree to cancel the agreement on a bill filed for that purpose.

The *Lord Chief Baron* delivered his opinion in this cause, which had been argued very much at length.

Lord Chief Baron.—This bill is brought by the plaintiff Davis to compel the specific performance of an agreement, by which, as the case is made on the part of the plaintiff, the defendant Symonds agreed in consideration of 800*l.* to convey the premises in question to the plaintiff Davis and the defendant Howell their heirs, executors, administrators, and assigns, some or one of them, or to such person or persons as they the said Davis and Howell, their heirs, executors, administrators, or assigns, some or one of them should direct or appoint. There is in the prayer of the bill an alternative that in case the plaintiff Davis shall not be entitled to have a performance of this agreement, he may be re-paid a sum of 100*l.* paid by him to Symonds as part of the purchase-money with interest. Davis is the sole plaintiff. The defendants are three, Symonds with whom the contract was made, Howell the joint contractor with the plaintiff, and Ormond who is a mortgagee under Howell. Howell has taken a conveyance from Symonds to himself, which the plaintiff charges to have been done in breach of the agreement, and that Ormond took under Howell with notice of the plaintiff's right, and therefore cannot affect the plaintiff's interest. In support of his case the plaintiff has produced the contract, which certainly imports to be a joint contract. Howell and Davis were of the one part, Symonds of the other part. Symonds agrees to sell to *them* and *they* agree to pay. Perhaps it was not necessary for the plaintiff to go further than to produce this intrument to establish the *primâ facie* joint contract: it would be enough to entitle him to the ordinary equity which this Court administers by decreeing specific performances: but he has gone further and examined witnesses to prove that

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the contract being made on the 17th November 1781, on the 12th December following he advanced 100*l.* in part of the purchase money, and the receipt is produced from Symonds stating this to be part of the purchase money; and as the money by the terms of the agreement was not to be paid until the 25th March 1782, discount was allowed accordingly. He has added some loose evidence of conversations which tend to shew them to have been joint purchasers; but it is so loose, as to have very little weight. This is the plaintiff's case; for as to the second agreement stated in the bill, there is no kind of proof of it, and I therefore lay that totally aside. To this case of the plaintiff, the defendants set up a variety of defences. First, they say that there having been in fact a conveyance of the estate from Symonds to Howell, this is in fact a performance of the agreement, and a Court of Equity cannot compel a second performance; and to be sure if the fact be true, the consequence is clear. They argue that this agreement being to convey to Davis and Symonds their heirs, executors, administrators, and assigns, some or *one of them*, &c. the conveyance made to Howell is an execution of the agreement, not only according to the letter, but also according to the spirit of it. As to the literal performance, I think the agreement can never be so construed; it never could be the real meaning of the parties, that the conveyance might be made to one of them singly; the words must be understood with relation to the possible change of situation of the parties. The obvious meaning was that the contract should be executed to them jointly. The gross absurdity which would attend any other construction is an unanswerable reason for rejecting it; for the consequence is that Symonds might have made the conveyance to the plaintiff Davies alone. Here are circumstances to shew that Howell was at least the principal contracting party, and therefore the conveyance being made to him does not put this absurdity in so strong a point of view; but the possibility of the other case happening, makes one revolt at such a construction of this agreement. I therefore think

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there has been no performance of this agreement. It is then insisted that though the agreement purports to be an agreement by which Howell and Davis were to be joint purchasers of the estate for a sum of money to be advanced by them jointly, yet that the real meaning of the agreement was that Howell should be the purchaser, and Davis was only to have some interest in the premises by way of security for such part of the purchase money as he should advance for Howell: and it is said on the part of the defendants, that they may read parol evidence to shew this, and they have stated the case in evidence to the Court to see whether this ought to be read. The admissibility of this has been disputed. If the defendants had said, we admit that by the agreement Howell and Davis were joint purchasers, but by reason of *circumstances dehors the agreement*, there arises an equity to make the Court say you shall only hold this as a security for money advanced, I should think for this purpose the evidence should be received; for it is not unusual to affirm the written instrument, and yet to raise an equity by which it is made a security only for a particular purpose. So in those cases in which young heirs, who have been dealing for their expectancies, have been relieved in equity, the Court says, you shall hold it as a security for the money *bonâ fide* advanced, they do not vacate the instrument; but they admit evidence to support this equity: you do not impeach the agreement, but get at this *dehors* the agreement; the instrument remains undisturbed and is not affected by the equity raised. But here this is attempted to be carried further, and parol evidence is offered to *alter* the agreement itself. Taking it so, it falls within all the rules in which parol evidence has been holden to be inadmissible. The foundation of them is in the general rules of evidence; in which writing stands higher in the scale than mere parol testimony; and when treaties are reduced into writing, such writing is taken to express the ultimate sense of the parties, and is to speak for itself. Indeed nothing is so familiar as this idea. At

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Nisi Prius when an agreement is spoken of, the first question always asked is, whether the agreement is in writing; if so, there is an end of all parol evidence; for when parties express their meaning with solemnity, this is very proper to be taken as their final sense of the argument. In the case of a contract respecting land, this *general* idea receives *weight* from the circumstance, that you cannot contract at all on *that subject* but in writing; and this therefore is a further reason for rejecting the parol evidence. In this way *only* is the statute of frauds material, for the foundation and bottom of the objection is in the *general* rules of evidence. I take this rule to apply in every case where the question is, *what* is the agreement? and this rule applies no further than this precise question; for as often as the question is, what were the collateral circumstances attending the agreement? so often may such collateral circumstances be proved by parol evidence: there is no law which says such collateral circumstances may not be so proved. If any of these collateral circumstances are reduced into writing, then the same rule applies to them as to the original agreement; but if not, both at law and in equity such collateral circumstances may be proved by parol. If duress be pleaded, or a false reading of the deed, you avoid the deed at law by parol evidence; but then these facts are collateral to the import of the instrument, they are *dehors* the agreement; they do not go to vary or alter it; yet admitting the truth of the agreement, they tend to shew that it ought not to affect the party. These are two instances at law; there are many more in equity, on fraud and circumvention and many other grounds, and you must necessarily admit parol evidence on all such grounds, which are clearly collateral to the agreement itself. Now to apply this to the present case: what is the true agreement? The defendants say, that it is only an agreement for the security of money. This is not collateral to, but a part of, the agreement itself. It might have been received if you had attempted by it only to raise a trust: but here the written agreement manifestly imports one thing, and you would by parol evidence shew that it imports no such thing. Rejecting the evidence on

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this point is the less material, for I think it is not in itself sufficient to shew what the defendant asserts. Davis appears to have endeavoured to assist Howell in making the purchase; but an objection was made as to Howell's competency to pay the purchase money upon which, though with considerable reluctance on the part of Howell, yet every other scheme being rejected, this seems to have been their final agreement.

There are two other points behind, made on the part of the defendant: 1st, they say that though the agreement did take place, yet that it was afterwards waved, and that such waver may be by parol; and it certainly may be so: the waver is in its own nature subsequent to, and necessarily collateral to, the agreement, and therefore can never bear any relation to the rule of evidence above stated. There might indeed have been another rule, that a written instrument shall not be waved by parol; but in fact Courts of Equity do not consider themselves as bound by any such rule, and it is now clear that a written agreement may be waved so. But in this case I do not think the evidence amounts to any proof of such a waver; it is very loose, and in some parts inconsistent with Davis's conduct at other times.

Another point made by the defendants is, that however this might be if the parties had come to the Court to have this agreement cancelled, yet that it is a very different consideration, whether the Court will decree a specific performance; and that as this is a remedy superadded to the remedy at law in order to make it more complete, and as the refusal of such superadded remedy is not conclusive on the party, who still may have his action at law, the Court therefore has a discretion to look into the circumstances, and see whether in all respects it is fit to interpose by decreeing a specific performance, and whether the conscience of the Court is bound. The distinction in respect of that discretion between the case where the bill seeks to set aside the agreement, and where it seeks to have a specific performance of it, is established in authority, and not now to be shaken. The strongest case has been cited to shew

this, namely, where a bill was brought to set aside an agreement, and the Court refused to do it, and afterwards a bill was brought to carry the same agreement into execution, and the Court refused to decree it. This therefore establishes the distinction practically and most clearly. We are then to inquire whether the circumstances in this case are such as to make it unfit for the Court to interfere. It has been contended that all the evidence which has been attempted to be used for the other two purposes was equally inapplicable to this point, as being only parol; but when it is said that parol evidence shall not *affect* written instruments, the vice of the argument turns upon the use of the word "affect," for if it means to "vary it," it is true, and if it is to be carried beyond that meaning, it is not true; there is nothing so clear as the jurisdiction of the Court to *affect* a written instrument by parol testimony; the Courts of Law do it every day, and in truth set them aside: Courts of Equity do it on other grounds and take a larger field. But this is a question far short of all those; for here it is only whether the Court, in exercising their *discretion*, shall from the evidence see reason to act or not to act: this must depend upon many circumstances which must of necessity (in general) be evidenced by parol. The case of the *Duke of Bucks* v. *Ward*, 3 *Bro. P. C.* 39, would illustrate this, if necessary, and *Hicks* v. *Phillips*, *Pre. Cha.* 575; the Court will never decree a specific performance unless the case of the plaintiff is perfectly clear from circumvention and deceit. In *Eyre* v. *Popham*, it seems as if concealing the name of the purchaser was a sufficient reason for not decreeing a performance. However, we may doubt particular cases, without shaking the principle, which is clear. In this case Howell the son of the former tenant, was desirous of purchasing the estate, and on application to the landlord for that purpose, brings the plaintiff with him to recommend him. The difficulty arose on the ground of the price: all the rest was agreed. Symonds was afraid Howell would not be able to pay it. Davis was applied to, and he professes to be

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ready to give Howell his assistance, and they go clearly on the idea that Davis should give a bond, and should have a security on the estate for what he should pay. He then insists on having this put in the shape of a joint purchase, holding out that this was only meant as a security, and that Howell might depend on his honour; and when Ormond applied to him to know his intentions, Davis said he only intended it as a security: under these circumstances the conveyance has been made to one party who advanced the whole money. In a case of this kind, where the conduct of the plaintiff has not been honourable, and the Court is not called upon in consequence of any purchase money being paid, why should the Court assist him? The purchase seems to have gone in the right way. However the Court does not deprive him of the benefit of his agreement; but they will not go out of their way to help him. Let him take his course at law. We do not say the agreement is void; only that exercising that discretion which Courts of Equity have in these matters, there is enough to influence that discretion and make us sit still. I am therefore of opinion, that as far as the bill seeks a specific performance, it must be dismissed; and I think it follows that it must be dismissed with costs; for the Courts refusing to give such relief in itself implies a strong disapprobation of the plaintiff's conduct.

There is another point behind. The plaintiff advanced 100*l.* to Symonds, which must be secured to him. He asks by the prayer of his bill, that it may be repaid him, but this is not regular. We can only take care that it shall be secured to him on the estate. Therefore the bill is not to be dismissed as to that part, until we are satisfied on this head: for the defendants say that the 100*l.* has been repaid; that it was left on a post at Davis's house, and that it was taken away by somebody, but they do not know who. As to the law of the case, this transaction can never amount to a payment, unless there is evidence to satisfy a jury that Davis in fact received it; for all payment includes acceptance: there is no other difference between tender and pay-

ment. I do not know that it would do, even if the money had been left in his house, unless the jury should think this evidence so strong as to infer acceptance from it. In truth it has been very absurd conduct of the parties to leave the money in this manner. However all we can do is to retain the bill for a year, with liberty in the mean time for the plaintiff to proceed at law as he shall be advised to recover this money, and the defendant shall not insist in the statute of limitations, and if Davis recovers this money, then we will give him a lien on the estate for it.

Hotham, Baron.—The great hinge of the cause is the question on admitting the parol evidence: and this is a question certainly of very great consequence. The deed is of such a sort, that on the face of it no doubt can possibly be entertained. It imports to be a joint contract, and if parol evidence were to be received in the manner the defendants wish, it would be setting up a perfectly distinct contract instead of it: but as to admitting it to shew collateral circumstances, it is not only consistent with former authorities, but is absolutely necessary: for fraud must be always *dehors* the deed; and it would therefore be the height of injustice to exclude it to this point. If the parol evidence is once received, there is an end of the cause; for upon that it appears that the plaintiff is not an honest man, and there is consequently no reason for us to interpose: and if his conduct be such, he must pay the costs.

Perryn, Baron, and *Thompson, Baron,* agreed.

At the Rolls. Sir Lloyd Kenyon. Nov. 29, 1787.

TOWNEND *versus* LOWE.

A *dedimus* issued to take the acknowledgment of a husband and wife who were resident in Jamaica. Owing to accidental circumstances, the *dedimus* was not returned until a year after the teste; and on this account the Cursitor refused to receive it, as being contrary to the practice of their office. But the Court directed the Cursitor to receive it.

It being necessary on the sale of an estate to levy a fine in order to complete the title, and the parties (husband and wife) being resident in Jamaica, a *dedimus* issued for the purpose of taking their acknowledgment; but by reason of some delays which took place, on account of the illness first of the parties, and then of the Commissioners, the *dedimus* was not returned until a year after the teste of it. A practice had prevailed in the Cursitor's office not to receive the *dedimus* unless returned within a year after the teste, and in consequence of this it had been very usual for the attornies employed to alter the teste so as to bring the return within the year. However in this case the purchaser refused to accept title, unless this practice was authorized by the Court. And the present petition prayed that the teste might be altered so as to make the return regular. The Cursitor attended and stated the constant practice of the office to be as above-mentioned.

The *Master of the Rolls* said he did not see how he could possibly alter the teste of the writ; but at the same time he conceived the practice of the Cursitor's office to be a very unreasonable one, and indeed if the *dedimus* had issued to the East Indies, it would be impossible it should ever be returned in time; that the practice of altering the teste was certainly improper; but he thought the right way would be to direct the Cursitor to receive the *dedimus* as it was returned, and to make out the writ of covenant conformably.

And his Honour directed accordingly.

FISHWICK *versus* LOWE.

At the Rolls. Sir L. Kenyon. Nov. 30, 1787.

Decree of foreclosure against a *tenant* for *life*, the tenant in *tail* being *abroad*.

This was a bill of foreclosure against the tenants for life and some incumbrancers under the will of the mortgagor; but the tenant in tail was abroad and out of the jurisdiction. And the doubt was whether the Court could decree a foreclosure without having the tenant in tail a party.

This had been spoken to some days before; but now the *Master of the Rolls* said he had looked into the cases which he thought most probable to bear any analogy to this, but they did not apply; that it was not like the case of parceners, for there you might proceed to summons and severance; yet he thought he might make the decree against the parties now before the Court; at the same time it was not easy to conceive how it could be worth the plaintiff's while to take such a decree. In the common case, a foreclosure was convenient, because it relieved the mortgagee from keeping accounts of the rents and profits; but here the tenant in tail might compel an account over again whenever he thought fit. However, if the plaintiff chose it, he would decree a foreclosure against the present defendant. And the usual decree was made.

STUART *versus* ANCELL.

In Lincoln's Inn Hall, Lord Thurlow. Dec. 10, 1787.

When an injunction has been obtained in a cause, which afterwards abates by the death of the defendant, the practice is to move on the part of the defendant's representatives that the plaintiff may revive within a reasonable time (a week generally) or the injunction may be dissolved.

In Linc. Inn Hall, Lord Thurlow. Dec. 10, 1787.

DIXON *versus* OLMIUS.

Plaintiff having referred a plea for impertinence, afterwards set the plea down for argument. This is a waver of the reference for impertinence, notwithstanding the defendant had attended the Master upon it.

It was moved on the part of the defendant, that an order obtained by the plaintiff to refer the defendant's plea for impertinence might be discharged. The ground of the motion was that the plaintiff two days after the reference had set down this very plea to be argued, which was said on the part of the defendant to be a waver of the reference. It appeared however that after the plea was set down, the defendant had attended the Master on the reference, three several times.

Ambler, for the plaintiff, contended that though it were true if any step was taken in respect of a plea or answer *before* the reference for impertinence, it would be a waver of all objection to it on the score of impertinence, yet it is not so, if it be after the reference; for then proceeding to set down the plea for argument had only the effect of preventing the delay, which otherwise might be thrown in the plaintiff's way, by excepting to the Master's report on the reference, &c.

Lord Chancellor.—There must be a line of practice on this subject, which ought to be settled and established. I take it at present that if you except to an answer, or reply, you wave your reference for impertinence; if you except to one of the very passages referred, can both these proceedings go on at the same time? There must be an universal rule on this subject one way or other. If I permitted this, I might possibly have to consider the question on the impertinence of the answer, after I had made a decree in the cause. Nay I might perhaps decree on the very part expunged. I will not enter into the particular circumstances of this case: for it must turn on a general rule of practice. The reason of the thing is, that you do wave the reference by proceeding otherwise in the cause; though if I should find upon inquiry the course to be settled otherwise, I shall certainly abide by it.

His Lordship directed the motion to stand over, that the practice might be inquired into; but afterwards the plaintiff consented to wave the reference for impertinence: and the order was accordingly made by consent.

Dixon v. Olmius.

WILLIAMS *versus* THOMPSON.

In Linc. Inn Hall, Lord Thurlow. Dec. 14, 1787.

It was moved that an order obtained by the plaintiff, whereby it was ordered that the plaintiff's clerk in Court might attend at the hearing of the cause with the record of the plaintiff's bill to have it taken *pro confesso* against the defendant, might be discharged, the defendant having since put in his answer. The answers of the other defendants were all in and replied to before the order was obtained. The motion was made on the authority of *Hawkins* v. *Crook*, 2 *P. W.* 556, in which *Lord Chancellor* reversed an order made by the *Master of the Rolls* for taking the bill *pro confesso*, the defendant having answered before hearing.

An order having been obtained by plaintiff that the Clerk in Court might attend at the hearing of the cause with the record of the bill, to have it taken *pro confesso* against one of the defendants (the others having put in their answers which had been replied to), this defendant afterwards put in his answer, and thereupon moved to discharge this order. The Court would not discharge the order on motion, but reserved the consideration of the matter to the hearing.

Lord Chancellor.—This case is very different from *Hawkins* v. *Crook*, for there the plaintiff excepted to the defendant's answer; and if a plaintiff will take so much notice of an answer as to file exceptions, he waves his right of having his bill taken *pro confesso*; and the general practice does not apply to that case; and Lord *King* seems to have gone on that idea. A plaintiff shall not have the benefit of a discovery by an answer, and at the same time the benefit of having his bill taken *pro confesso*, which depends on no answer being given to it. To be sure if an order had been obtained for taking a bill *pro confesso*, and a defendant applied on the score of surprise or accident, and within a reasonable time, the Court might on making out such special case, listen to him; but I should hesitate very much in saying that the merely putting in an answer just before the hearing should be sufficient to get rid of the order for taking the bill *pro confesso*. However all this is proper to be discussed at the hearing, and at present I shall do nothing in it.

In Lincoln's Inn Hall, Lord Thurlow. Dec. 17, 1787.

DIXON *versus* OLMIUS.

DEMURRER.

The bill stated that a testator intended to republish his will, but was prevented from so doing by the fraud of the heir at law. A demurrer to so much of the bill as required him to discover whether the testator did not intend to republish his will, was, under these circumstances over-ruled.

The bill was filed by some of the specialty and simple contract creditors of the late Lord Waltham on behalf of themselves and the other creditors, and also by some of the legatees under his will on behalf of themselves and the other legatees, praying that the will might be established, and the trusts thereof performed and carried into execution; that the personal estate might be applied in payment of debts and legacies, and if not sufficient, that a competent part of the real estate might be sold for that purpose.

It stated that on 2d February 1787, Lord Waltham made his will, and thereby charged his real estates with the payment of his debts in the manner there mentioned, and died on the 10th February following, leaving the defendant Elizabeth, the wife of the defendant Olmius, his sister and heir at law; that the defendants pretended that this will had been revoked by a fine levied and recovery suffered of the real estates charged by the will with payment of the debts, subsequent to the said will. The bill then charged, that if such fine and recovery did operate as a revocation of the will, yet that Lord Waltham only intended such fine and recovery to answer some particular purposes, and that he meant and intended to republish his said will, but was prevented from so doing by several acts of fraud and violence on the part of the defendant, who would not permit the attorney sent for by Lord Waltham to go into his bedroom, together with several circumstances of fraud very fully charged by the bill.

To this bill the defendants put in a demurrer, and a plea and an answer. The demurrer was as to so much of the said bill as required from the defendants a discovery whether the said Lord Waltham did not mean or intend to republish his said will. The plea was to such parts of the

bill as prayed any relief in respect of the real estate, and the plea was the fine and recovery, with an averment that Lord Waltham died intestate. The plea was argued at the same time with the demurrer, but was over-ruled on a point of form.

By the answer the defendants gave explicit denials to the several charges of fraud and obstructing the republication of the will.

Mr. Recorder and *Mansfield* in support of the demurrer argued that the discovery sought was wholly immaterial, which was in itself a good ground of demurrer; it could be of no consequence what the defendant thought to be the intention of Lord Waltham, nor indeed what he did in fact intend, for if the fine and recovery have in law operated a revocation of this will, there must be an actual republication of it in order to give it any effect, and the intentions of Lord Waltham could never get rid of the requisites imposed on a will of real estate. But if such a discovery were material, and could have any operation in giving new effect to this will, then it would be calling upon the heir at law to make discovery of an adverse title; that this was what the Court would never compel an heir at law to do, who always stood in a favoured light in a Court of Equity; that this had been frequently determined in the case of a purchaser for a valuable consideration, and the same principle would extend to the case of an heir, who was entitled to an equal protection from the Court.

Lord Chancellor.—The charge of the bill is, that Lord Waltham had an intention to republish his will, and that such intention was frustrated by the fraud of the heir at law, or at least of her husband. I think it impossible to separate the fact of Lord Waltham's intention, from the facts of fraud imputed. The defendants must answer the former as well as the latter.

The demurrer was over-ruled.

In Lincoln's Inn Hall, Lord Thurlow. Dec. 18, 1787.

MAYOR OF DARTMOUTH *versus* SEALE.

DEMURRER.

A defendant having demurred to a *part only* of a bill, and then answered other parts, it is no objection to the allowance of the demurrer, that it is equally applicable to the *whole* of the bill.

The bill stated that the plaintiffs were the Mayor and Burgesses of the borough of Dartmouth; that the said borough was an ancient borough, and that the plaintiffs in their aforesaid capacity were seized of, or entitled to, the manor of A. in the county of Devon, and all the royalties and appurtenances thereto belonging; that the plaintiffs were in the possession and receipt of the rents and profits of the said manors and appurtenances, and in the exercise of all manerial rights; that a certain person in the bill named was killed on the said manor by a kick of a horse, and that the plaintiffs *thereby became entitled to the said horse*; that defendant, under some pretence of being entitled to the manor on which the said person was killed, had possessed himself of the said horse, and had since killed it. And the bill prayed a discovery of these several matters, and of the defendant's title to the said manor, and that he might set forth all his title deeds, &c. and might leave the same in the hands of the clerk in Court, &c.

To so much of the said bill as required the said defendant to discover how and in what manner he claimed any title to the said manor, and to set forth all the deeds, papers, and writings in his custody relating thereto, and that the said defendant might leave the same in the hands of his clerk in Court, &c. the defendant demurred, for that the plaintiff had not shewn by his bill any title to such discovery.

The *Lord Chancellor* asked whether the bill had stated that the plaintiffs as lords of the manor were entitled to deodands?

The counsel for the plaintiffs admitted that this was not expressly stated, otherwise than by the charge that in consequence of the man's being killed by the horse the plaintiffs

Mayor of Dartmouth v. Seale.

became entitled; but they insisted that if this objection held at all, it must go to the plaintiff's whole right to sue, and consequently must extend to the whole bill; but that the defendant had answered the greater part of the bill, and thereby waved the objection to the plaintiff's right of suing.

But the *Lord Chancellor* said he never would admit the objection to a demurrer to a part of the bill, that the defendant had not demurred to the whole, which he thought might have been done.

The demurrer must be allowed.

RAINSFORD *versus* FREEMAN.

In Linc. Inn-Hall, Lord Thurlow. Dec. 21, 1787.

PETITION.

In this case the infant's maintenance had been settled in the usual course by a reference to the Master about seven years back. The present petition stated the change of situation of the infant since that time, and prayed the Master might inquire what was proper to be allowed beyond the former maintenance and what *had been expended* by the guardian *beyond such former allowance*.

Lord Chancellor said he was very unwilling to make any reference in respect of what a guardian thought proper to allow to the infant beyond the maintenance settled by the Court, and that this never should be done except under special circumstances. However in the present case his Lordship thought there was reason for what had been done, and made the order according to the prayer of the petition.

If a guardian expends more in the maintenance of an infant than the sum allowed, the Court will not make any reference as to such extra expenditure, unless a special case is made for that purpose.

In Linc. Inn-Hall, LordThurlow. Dec. 21, 1787.

EX PARTE BARKER.

PETITION.

An action having been commenced on the petty bag side of the Court of Chancery, but tried in K. B., an application for a new trial must be made in K. B. and not in the Court of Chancery.

An action had been commenced on the petty bag side of the Court by a Six Clerk of the Court against a Sixty Clerk for certain fees due from him to the Six Clerk. The record was delivered to K. B. and the plaintiff had obtained a verdict in the course of the sittings after Trinity Term. The defendant had applied to the King's Bench for a new trial, which had been refused. He now petitioned the *Lord Chancellor* to direct a new trial of the said action, insisting that the record being sent out of this Court, the application to the King's Bench had been erroneous, and that this Court should judge of the propriety of a new trial.

But *Lord Chancellor* said, that when a record was sent out of this Court on an issue of fact, the King's Bench was to send it back with final judgment upon it; and therefore whatever objection there might be to the verdict should be stated there. Besides which the application was at all events too late; for if it could be made at all, it must be made within the four first days of Term.

In Lincoln's Inn Hall. LordThurlow. Dec. 22, 1787.

IN MATTER OF FUST.

PETITION.

It is in the *discretion* of the Lord Chancellor to grant leave to any person *grieved*, &c. to traverse an inquisition of lunacy. Re-

An application had been made for a commission of lunacy against Fanny Fust, against which a caveat was entered by Mr. Bowerman, who alleged he had married Miss Fust in Flanders, according to the rites of that country. An attendance was ordered upon the petition and several affidavits were read on each side as to the sanity or insanity of the young lady. It appeared that she had just

In re Cumming 1 Dey. Mack. & Gor. 540.

In Matter of Fust.

attained her age of 21 when Mr. Bowerman carried her off from her mother's house near Bristol, and in company with two other ladies conveyed her to Flanders, where they were married two several times. She was entitled to a very considerable fortune, a real estate of 1500*l. per annum*, and a large sum of ready money, in all of the value of about 70,000*l.* On hearing the petition and the affidavits the *Lord Chancellor* directed the commission to issue, upon which Miss Fust was found a lunatic. The present petition was preferred by Mr. Bowerman, praying the inquisition might be quashed, and a new commission issue, or that the petitioner might be at liberty to traverse the former inquisition.

fused to the husband of the lunatic under circumstances which made the validity of the marriage doubtful.

The former part of the prayer of this petition which went to quashing the inquisition was not much insisted upon by *Mansfield* and *Graham* on behalf of the petitioner, but on the latter part, they urged that by the stat. 2 and 3 *Edw. VI. c.* 8. sect. 6, it is provided that "if any person be untruly found lunatic, *every person* and persons grieved or to be grieved by any such office or inquisition shall and may have his or their traverse to the same immediately, or after, at his or their pleasure, and proceed to trial therein, and have like remedy and advantage as in other cases of traverse upon untrue inquisitions or offices found;" that the present practice was to apply to this Court for leave to traverse these inquisitions, but that this Court in considering the party's right to such demand, pursued the statute of *Edw. VI.* and granted such permission to every person grieved, or who could be grieved by the inquisition; that as to Bowerman's right to traverse, it was clear by the words of the statute, that it was not confined to the supposed lunatic only, for the words "person *or persons* aggrieved," must evidently extend to other persons; that Bowerman was in fact her husband, and as such had in him the freehold of her land; that this created in him a very important interest, and he might be surely said to be aggrieved by this inquisition, if it were untrue, and that it was impossible for him to procure his wife to join in this application, as she was

In Matter of Fust.

now in the care of her mother, who had taken out the commission.

Lord Chancellor.—Most certainly, if this Court has a discretion, which I believe it has, in respect of permitting these inquisitions to be traversed, great care should be taken in the exercise of that discretion, that the Court does nothing which can stand in the way of the great ends to be answered by the protection it affords to persons in the unhappy situation of lunatic. I do not think much argument follows from the act of *Edw VI.* That act was meant only to remedy a very harsh prerogative. But where the Court is applied to upon these occasions, it must take great care that the general object of the proceedings under a commission shall not be disappointed by such applications. It will be a very proper step for the mother to discuss this marriage. By the account given by the petitioner's friends themselves, she was very weak and infirm of mind. She had a very large fortune: she was of age, and there was no reason for an elopement but from an apprehension of her infirmity. She had been kept and treated by the family as a very weak creature; and when she was stolen from her family, she was kept and treated much in the same way. The Court will never give any assistance or countenance to a man who has obtained this woman in such a manner: she is now in the properest hands, and it is the duty of the mother to discuss this marriage most seriously, and to see whether she cannot in that manner get rid of this gentleman's pretensions.

In Linc. Inn Hall. Lord Thurlow. Dec. 24, 1787.

EX PARTE COPLAND.

PETITION IN BANKRUPT.

Joint creditor is entitled to prove his debt under

This was a petition of joint creditors to be admitted to prove their debts and receive a dividend under a separate commission take out against one partner.

Ex parte Capland.

a separate commission taken out against *one* partner.

The *Lord Chancellor* asked whether the Commisioners had rejected this debt on the point of form whether a joint creditor could prove a debt under a separate commission, or whether they had gone into the consideration of this particular debt.

It was admitted that the Commissioners had rejected the proof of the debt on the point of *form*.

Lord Chancellor.—As the Commissioners have rejected this claim *in limine*, I shall not go into the consideration of it, but shall only direct that the parties be at liberty to make proof of the debt before the Commissioners. But as I think the Commissioners were very wrong in the point of form, I think it proper to declare that a joint creditor is entitled to prove his debt under a separate commission taken out against one of the partners. He is a creditor of each. I shall leave it open to the Commissioners to determine as they shall think fit when they hear the claim; but at present they have exercised no judgment upon it.

DELORNE *versus* HOLLINGSWORTH.

In Linc. Inn-Hall, Lord Thurlow. Jan. 16, 1788.

DEMURRER.

Plaintiff claimed as *heir at law* of A. stating that one person through whom she made title had three sons, and that she claimed under the second son, but without alleging that the first son died without issue. Demurrer, "for

In this bill the plaintiff claimed to be entitled to certain premises as heir at law of an ancestor, and prayed a discovery of the defendant's title and an account of rents and profits. The plaintiff by the bill did not state the pedigree fully, but stated that one person through whom he made title, had three sons, and that she claimed under the second son, without alleging that the first son died without issue.

The defendant demurred, for that the plaintiff claimed as heir at law of the ancestor, but had not by her bill sufficiently stated the pedigree by which she made title.

Scott and *Mitford*, in support of the demurrer, argued that as it was now determined, that a plea, that the plaintiff

Delorne v. *Hollingsworth*

"that the "plaintiff had "not by her "bill suffi- "ciently stat- "ed the pedi- "gree by "which she "made title," was over-ruled.

was not heir, was not a good plea (to which the *Lord Chancellor* assented), there would be a manifest inconvenience in permitting a plaintiff to come into this Court for a discovery of a defendant's title upon the bare allegation of being an heir at law; that when the plaintiff claimed in character of heir, she must shew in what manner she asserts that title as much as in the case of any other title; that here was a most manifest defect on the face of the bill, viz. that an elder son did not appear to have died without issue, and plaintiff claims under his younger brother.

Lord Chancellor.—The same inconveniencies as are suggested in this case, in respect of defendant being called upon for a discovery of their titles by a person barely alleging himself to be heir without stating any pedigree, would equally hold in cases where a plaintiff stated a full pedigree which is wholly fictitious. If this demurrer were to be allowed, it would only drive the plaintiff to supply the pedigree in another bill, and then I do not see the propriety of trying the main question, and cutting short the cause in this stage of it, unless a special case could be made out by which it appeared that some great length of proceedings or some great expense would be saved by it. The whole question is, whether the allegation in the bill of the plaintiff being heir is not sufficient to entitle her to go on in the suit, and in general I see no reason why it should not.

Demurrer over-ruled.

In Linc. Inn Hall, Lord Thurlow. Jan. 19, 1788.

BRYAN *versus* CORMICK.

When a mortgagee is *not* in possession the Court will, upon application of creditors, ap-

The bill was filled by creditors for payment of debts out of real estates, one part of which were in Essex, the other in Middlesex. *Lloyd* moved for a receiver, which was objected to by *Hollist* as to the Middlesex estates on the part of mortgagees, on the general ground that the Court

never appointed a receiver of a mortgaged estate without the consent of the mortgagee.

Bryan v. *Cormick.*

Lord Chancellor asked if the mortgagees were in possession, and it appearing they were not, his Lordship said he could see no reason, if the mortgagee had not thought proper to take possession why the Court should not put a receiver on the estate, so as that it should be without prejudice to the mortgagee's right to obtain the possession. Where a receiver has been appointed of a mortgaged estate, the mortgagee not being brought before the Court, the mortgagee must apply to the Court for liberty to bring an ejectment, which is of course. So here, if the receiver is appointed without prejudice to the mortgagee's right, there could be no objection to it. And his Lordship ordered that a receiver should be appointed without prejudice, &c.

Point a receiver of the mortgaged premises, but without prejudice to the right of the mortgagee to obtain possession.

BRYDGES *versus* HATCH.

In Linc. Inn Hall. Lord Thurlow. Jan. 19, 1788.

In this case an order was made for examining a witness *de bene esse* upon the mere ground of his being the only person in whose knowledge a material fact was, upon the authority of *Shirley* v. *Lord Ferrers*, 3 *P. W.* 77.

Witness examined *de bene esse* upon the *sole* ground of his being the *only* person in whose knowledge a a material fact was.

EX PARTE BOLD.

In Linc. Inn-Hall, Lord Thurlow. Jan. 22, 1788.

PETITION IN BANKRUPTCY.

A commission of bankruptcy had been taken out against Liscombe Price, as a money scrivener, and he had thereupon been found a bankrupt. The present petition prayed the commission might be superseded, contesting prin-

An attorney having given an undertaking to put in bail for

Ex parte Bold.

cipally the trading of the bankrupt. The question now made was, whether the petitioner had such an interest as to entitle him to make such application. Price was an attorney, and was employed for a person against whom the petitioner brought an action in the Court of Common Pleas. Price gave an undertaking to put in bail for his client, which he neglected to do, and thereupon an order was made by the Court that he should put in bail according to his undertaking, and aftewards an attachment issued against him for disobedience of that order. The costs were also taxed by an order of the Court.

his client which he neglected to do, an order was made upon him to put in such bail, and an attachment issued against him. The attorney became a bankrupt. The plaintiff in the action has a sufficient interest under these circumstances to support an application to supersede the commission.

Mansfield insisted that the petitioner was not a creditor of Price, and could not be heard on this application, that if the attachment had gone against Price for nonpayment of a sum of money to the petitioner, it might be considered as a judgment which would make the petitioner a creditor, but as it was, the proceeding was merely a vindictive proceeding against the party for his contempt, and the most that could be done against him would be to imprison him until he cleared his contempt, which would probably be by payment of the debt and costs.

But *Lord Chancellor* thought the petitioner was sufficiently interested under these circumstances to support this application, and directed an issue in the Court of Common Pleas to try whether Price was a trader within the bankrupt laws.

In Court, Lord Chancellor, Master of the Rolls. Jan. 23, 1788.

WRIGHT *versus* NUTT.

The author's note of this case is printed at length in 1. *H. Blacks. Rep.* 136.

In Court. Lord Chancellor. Jan. 26, 1788.

BRYMER *versus* BUCHANAN.

In the course of the proceedings on a bill of interpleader a commission issued on the part of one defendant for the examination of witnesses, of which notice was given to the plaintiff, but *not* to the other defendant. This practice, though it may be inconvenient, is *not irregular*.

This was a bill of interpleader. A commission issued for the examination of witnesses at Dunkirk on the part of one of the defendants, with notice to the plaintiff only and not to the other defendant. It was now moved on the part of the other defendant, that the order for the commission might be discharged for irregularity, for that in a bill of interpleader, the defendants were the only litigating parties, and that they ought to have the same opportunity of cross-examining each other's witnesses, as a plaintiff and defendant had in common cases.

Mitford opposed the motion, and insisted, that till a decree was made, an interpleading cause was considered just as any other; till then it does not appear that the defendants are to interplead, nor do they ever interchange copies as is usual between a plaintiff and defendant.

Lord Chancellor said, it might not perhaps be an inconvenient rule to make, that defendants to a bill of interpleader should give notice to each other of the issuing of a commission; but it had not yet been done, and he therefore could not discharge the order for irregularity.

At the Rolls. Sir Lloyd Kenyon. Jan. 28, 1788.

ANDREWS *versus* DOBSON.

Legacy to "James son of Thomas A." There was no person of that description; but

A legacy of 500*l.* was given to James son of Thomas Andrews of Eastcheap, printer. There was no person of the name of Thomas Andrews in Eastcheap, but there was James Andrews a printer who lived there; he had one son named Thomas by his first wife, who was related to the

Bennett v Marshall 2 Kay V.S. 741.

Andrews v. *Dobson.*

testator; he had also a son by a second wife, named **James**, who was in no manner related to the testator. The plaintiff in this cause was the son by the first wife, who claimed the legacy, insisting the testator meant "Thomas the son of James," instead of "James the son of Thomas," and prayed some inquiry respecting these circumstances.

But his Honour said, though there were cases, in which legacies were left to persons by nick-names, and evidence had been admitted to shew that the testator usually called them thereby, yet he thought this was beyond all precedent, and dismissed the bill.

there was a "Thomas son of James A." The Court will not receive evidence to shew that this was a mistake in the description.

At the Rolls. Sir Lloyd Kenyon. Jan. 31, 1788.

ARNOLD *versus* BLENCOWE.

The renunciation of *one* executor in the *lifetime of another*, is a nullity. It is not binding on him unless made after he has become the *survivor*.

There were four executors of a will; A. alone proved it; B. C. and D. renounced probate. A. died, leaving executors who proved his will. The doubt was, whether the executors of A. or the surviving executors of the original testator, were now representatives of the original testator.

His Honour thought, that the renouncing of B. C. and D. in the lifetime of A. was a mere nullity, for they might notwithstanding their having renounced, come in at any time and prove, and the testator would not be unrepresented until the surviving executor renounced after the death of his companions. This was so held in *House* v. *Lord Petre*, *Salk.* 311. and in *Rex* v. *Simpson*, 3 *Burr.* 1463.

His Honour ordered the cause to stand over for want of parties on this ground, there being only the executors of A. before the Court.

Oakes v Oakes 9 Hare 669. Trimmell v Fell 16 Beav. 539.

DINGWELL *versus* ASKEW.

At the Rolls. Sir Lloyd Kenyon. Feb. 5, 1788.

Stock was, in contemplation of a marriage vested in trustees for the separate use of the wife for life, and with full power for her to dispose of it by *will*. She made her will during *coverture*. She survived the husband, and afterwards took a transfer of the stock into her own name. This does *not* operate as a revocation of the will, or an ademption of the bequest of the stock.

Certain quantities of stock were previously to a marriage vested in the names of trustees, and were upon the marriage settled to the separate use of the wife for her life, then to the issue of the marriage, then to such persons as the wife should by will appoint, and in default thereof to the wife absolutely; and in the settlement a very full and ample power was given to the wife to make a will notwithstanding her coverture, and to dispose of this property as she should think fit. The wife made a will during coverture, in which she recited the power she had under the settlement, and in pursuance of that power she disposed of the stock, and then the husband died in her life time without issue. After the death of the husband the wife took a transfer of the stock from the trustees into her own name; and died without making any other will than as aforesaid. And the question was, whether the calling in the stock from the trustees should be a revocation or an ademption of the bequest.

It was argued to be a revocation or ademption on the ground that by the transfer the wife acquired to herself a new estate or interest in this fund from that which she had at the time of making her will, and upon which that will operated; that the same presumption would be raised in this case, as where a man makes a will of land, and afterwards by feoffment or otherwise takes a new estate in the same land to himself, and precisely for the same interest as he had in it before, yet such feoffment will work a revocation. The interest which she acquired by the transfer was very different from that limited to her by the settlement, and the specific subject of her bequest was therefore gone at the time of her death.

Master of the Rolls.—This case is new in specie, but I have very little doubt about the grounds on which I am to

Dingwell v. Askew.

decide it. If it could be proved, that when the wife took the transfer, her intention was altered, it would decide the question; but there is no such thing in proof here; and if I were to hazard conjecture on the subject, which I am not inclined to do, I should think her intention remained the same. Under the settlement she had a power of disposing of this property beneficially by will. The property was then in trustees, which was necessary for securing it from the control of the husband; but the instant the husband died, the reason for vesting it in the trustees ceased; her interest in it after the transfer was not in fact more beneficial, but only more convenient to her, which however was a sufficient reason for her to wish to get rid of the intervention of the trustees. It has been decided that where a person, having an equitable interest in real property, devises it, and afterwards gets the legal estate, this will be no revocation. So here there is no new beneficial interest acquired. If therefore we were to construe this with equal strictness as the rules respecting real estate, it would be no revocation; much less so in case of personalty. I am therefore very clearly of opinion, though I know no case in point, that this property will pass by this will.

In the Exchequer. Hilary Term, 1788.

COLLIER *versus* BROWN.

Mere inadequacy of price where it cannot be used as evidence of fraud, is not of itself sufficient to prevent the Court from decreeing a specific performance

This was a bill filed to compel the specific performance of an agreement, under the following circumstances.

Mary Turner was seized in fee of the premises in question, which consisted of some closes called Lamperheads, which had been let for forty years last past, at a rent of 7*l.* per annum, and some other closes called Honey-hams, which had for several years been let at a rent of 8*l.* per annum; and she was also entitled for life to a leasehold close, let at 40*s.* per annum. Mary was very old and in-

of an agreement for the purchase of land.

firm, and resided at Oxford, which was a considerale distance from the premises, the management of which was totally left to William Turner, a relation, who lived near the place.

Mary Turner having intimated an intention of selling the freehold premises abovementioned, William Turk the tenent of Lamperheads, applied to her to become the purchaser; but then finding that she had only occasion for 100*l.* which she rather wished to raise by mortgage, no treaty was entered into for the purchase; but Turk promised to procure her that sum of money, intimating however that if she should be inclined to sell, he wished to treat with her for that purpose. Turk accordingly applied to the plaintiff William Collier to lend the 100*l.*, who promised so to do; and by deed of 13th April 1782, Mary Turner mortgaged the premises to the plaintiff for that sum. She afterwards renewed her intention of selling them entirely, and it appeared in evidence, that on 12th August 1783, the plaintiff and his brother John Collier went to the house of Mary Turner at Oxford, and told her their purpose of purchasing the estate; whereupon she told them that if they would call the next morning, they would meet Mr. Cooling (a young man who lived with her, and had the management of her affairs) who would treat with them on the subject. The next morning they went again and met Cooling: when the subject was mentioned, Cooling said the estate was worth 300*l.* Mary Turner said she knew nothing about the estate, but thought it must be worth that money: the plaintiff at first bade her 250*l.* and after several biddings on each side, it was agreed that 275*l.* should be the purchase money; and Mary Turner said that as her life was so bad, the plaintiff should have the small leasehold close into the bargain. An agreement was drawn up in writing by Cooling to this effect, and signed by Mary Turner and the plaintiff, and was attested by John Collier, William Cooling, and Mary Crozier, a servant in the house, and Cooling accepted a guinea as earnest, and the plaintiff promised to remit her a further sum of 50*l.* in a few days in part of the purchase money,

Collier v. Brown.

which he accordingly did. Mary Crozier proved that as soon as the plaintiff and his brother were gone, Mary Turner declared she was very sorry for what she had done, and that she thought the plaintiff was the tenant of part of the premises, but her memory was very bad.

As soon as William Turk heard of Mary Turner's having made this agreement with the plaintiff, he went to her at Oxford, and represented to her that he expected to have had the refusal of the premises, whenever she was inclined to sell them, and that he should not think of offering her less than 400*l.* for them: and she conceiving herself to have been imposed upon by the plaintiff in respect of the value of the premises, said she should not consider herself as bound by that agreement, and that she would sell them to Turk for 400*l.* and accordingly on 11th Sept. 1783, an agreement was entered into between Mary Turner and Turk for the sale of the premises to Turk for 400*l.* and she engaged not to do any thing in performance of the agreement with the plaintiff. On the day following Mary Turner caused notice to be sent to the plaintiff, that, having been imposed upon with respect to the value of the said premises, she should not consider herself as bound to perform the agreement with him; but desired that the same might be delivered up to be cancelled, and added that she was ready to pay him the principal and interest due on the mortgage, together with the guinea paid in earnest, and the 50*l.* paid to her afterwards. And these several sums of money were afterwards tendered personally to the plaintiff. After this Turk agreed with John Brown to sell him the closes called Honey-hams for 245*l.* in the case the agreement made between him and Mary Turner should be carried into execution.

The plaintiff then filed his bill against the said Mary Turner, John Brown, and William Turk, praying a specific performance of his agreement with the said Mary Turner, and that Brown and Turk might be declared to be purchasers with notice of the plaintiff's interest in the said premises, and therefore to be trustees for the plaintiff, and that they might join in proper conveyances to the plaintiff.

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Mary Turner died without having put in her answer to the said bill, and the cause was revived against William Cooling her executor, and Mary White her heir at law. And the defendants by their answers stated the facts abovementioned, and resisted the prayer of the bill, on the ground of the said Mary Turner being imposed upon in respect of the value of the premises.

There was some evidence on the part of the plaintiff, as to the value of the premises not exceeding the price given for them by the plaintiff; but on the part of the defendants it was fully proved by William Turner, that when he was employed by the said Mary Turner to find a purchaser for the said premises, he had been repeatedly offered 400*l.* and 420*l.* for them, and that he had reason to expect to have sold them for 500*l.* if the said Mary Turner had not entered into this agreement with the plaintiff. Other witnesses swore they would have given from 420*l.* to 450*l.* for them, and they all stated the modes in which they calculated their value.

On these facts and this evidence the cause now came on to be heard, when it was strongly insisted upon on the part of the defendants, that even if no fraud or imposition or actual misrepresentation were to be imputed to the plaintiff, yet it was the constant course in Courts of Equity, to refuse their assistance in enforcing a contract, where the price was grossly below the real value: that the compelling the specific performance of agreements was a subject on which they had always exercised that sort of discretion, because the refusal of this assistance did not preclude them from such damages as they might recover at law; and therefore that Courts of Equity always expected to see fair conduct, and a fair bargain on the part of the plaintiff before they rendered him any assistance.

But the Court were of opinion in the present case, that the parties bargained with their eyes open, and that no imposition or surprize was proved in the case; that Mary Turner was very well satisfied with her bargain until she found she could get more for the premises; that under these circumstances, mere inadequacy of

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price, (where it cannot be used as evidence of fraud,) is not of it itself sufficient to prevent the Court from administering its usual equity: for if it were, it might be difficult to draw the line, or to say that whenever a better offer is made, it shall not be reason why a former agreement should not be executed.

At the Rolls. Sir Lloyd Kenyon, Feb. 14, 1788.

STANLEY *versus* WISE.

Testator had four daughters A. B. C. & D. and by his will gave 4000*l.* to each of his daughters A. and B. with a direction, that if either of them died unmarried, 3600*l.* part of the 4000*l.* should be divided among his surviving daughters, and the child or children of such of them as should be then dead. A. died unmarried. C. had five children, two of whom survived A. but the other three died in her life-time. The *five* children of C. took *vested* interests in equal fifths of the fund, as

The testator in this case had four daughters Mary, Sarah, Elizabeth and another, and by his will gave to his daughters Mary and Sarah 4000*l.* each, and then followed this clause: "Item, in case either of my said daughters "Mary and Sarah shall die unmarried, then I do hereby "empower her to give and dispose of the sum of 400*l.* "part of the said sum of 4000*l.* as she shall think fit; but "I expressly will and direct that the sum of 3600*l.* residue "of the said sum of 4000*l.* shall go and be divided amongst "my surviving daughters, and the child or children of "such of them as shall be then dead, such child or children "to have their mother's share."

Sarah died unmarried. Elizabeth had five children, two of whom survived Sarah, the other three died in her life-time; and the question was, whether the share of Elizabeth in the 3600*l.* part of Sarah's legacy, was a vested interest in the three children of Elizabeth, who died before Sarah, together with the two who survived her, or whether the whole went to the two survivors.

The cases of *Ellison* v. *Airey*, 1 *Vez.* 111. and *Baldwin* v. *Kerver*, *Cowp.* 309. were cited.

Master of the Rolls.—Nothing can be more reasonable than the intention which seems to have guided this testator, that after having provided for his two daughters Sarah and Mary, the other two should come in by substitution, if they died unmarried. If the devise over in that event, had

Kirkman's Trust 3 Sch. & Lef. 561.
Penny v. Clarke 1 K. & J. 412.

Stanley v. Wise.

been to the two other daughters, it would have been a clear vested interest; but the testator looked further, viz. to his grand-children, the children those two daughters should leave. If it had been a limitation of real estate to A. for life remainder to the children of B. every child of B. would have a vested interest, liable to be devested in quantity by the birth of subsequent children. In this case there is no intimation of confining his bounty to any particular children of Elizabeth: and I am therefore of opinion that all the children of Elizabeth took her share amongst them, and that it is consequently divisible in fifths.

well those who died before, as those who survived A.

SWEET *versus* PARTRIDGE.

In Lincoln's Inn Hall. Master of the Rolls for Lord Chancellor. Feb. 20, 1788.

On a bill by creditors for sale of a real estate for payment of debts, the heir at law being an infant, the parol demurred, and plaintiffs praying a receiver of the premises. His Honour at first thought he was not at liberty to do this; but afterwards on the authority of *Docker* v. *Homer* before the *Lords Commissioners* in 1783, his Honour directed a receiver, and said he was very glad to find the precedent.

Bill for sale of real estate for payment of debts. The heir at law being an infant, the parol demurred. The Court will appoint a receiver as in other cases.

WYNCH *versus* WYNCH.

In Lincoln's Inn Hall. Master of the Rolls for Lord Chancellor. Feb 21, 1788

Alexander Wynch by his will, gave to each of his daughters Margery and Frances Wynch, the sum of 10,000*l.* to be paid them respectively at their attaining the age of 21 years, or day or days of marriage, which should first happen; and *he directed his trustees should pay and*

Where a father gives a legacy to a child payable at a future day,

Re Rowe's Est. 9 Hare 651. 2 F Leslie v. L. Ca. t. Sug. 1. Re George. 5 C. D. 837 Duncan v. Needham. 9. Beav.

Wynch v. *Wynch.*

and makes an express provision for maintenance out of another fund, the legacy shall not carry interest until the time of payment.

apply such sum and sums of money out of his personal estate towards the maintenance and education of his said daughters respectively until their said portions should become payable, as to his executors and trustees should seem fit and necessary, not exceeding the interest of their respective portions after the rate of 4 per cent.; and he declared it to be his will that the legacies so given to his said daughters respectively should not be considered as vested interests until the same should become payable as aforesaid; but in case the said Margery and Frances, or either of them should happen to die before 21 and unmarried, then that the portion or portions of her or them so dying should sink into the *residuum* of his personal estate, and be considered as part thereof.

The question made on this part of the will was, whether Margery and Frances Wynch were entitled absolutely to interest at 4 per cent. on their legacies, or only to a maintenance, till the time they became payable.

A paper which was found wrapped up with the testator's will was produced, which was strongly in favour of the daughters' claim of interest; but it appearing to the Court to be of a testamentary nature, and not proved in the Spiritual Court, his Honour declared he could take no manner of notice of it, and that he should deliver his opinion upon this point, as if he had never seen or heard of the paper.

The *Solicitor-General* and *Campbell* argued that on the clause itself the daughters were entitled to interest on their legacies at 4 per cent.; that if nothing had been given by the will by way of interest or maintenance, yet this being a legacy to a child, it would of itself carry interest from the death of the testator, whether a vested legacy or not; for in that case the Court always gave the whole interest of the legacy as a maintenance for the child.

Master of the Rolls.—It is very clear that when a father gives a legacy to a child, whether it be a vested legacy, or not, it will carry interest from the death of the testator, as a maintenance for the child; but this will be only where no other fund is provided for such maintenance; for it is

Wynch v. Wynch.

equally clear, that where other funds are provided for the maintenance, then if the legacy be payable at a future day, it shall not carry interest, until the day of payment comes, as in the case of a legacy to a perfect stranger. Now here the father has directed that *maintenance* shall be paid *out of his personal estate;* if it had been payable out of *the interest of the legacies*, I should have thought the daughters entitled to what they claim; but as it is, I think they are not entitled to interest on their legacies *eo nomine*. I therefore declare that Margery and Frances Wynch are not entitled to interest on their legacies, until the same become paybale, but only to maintenance not exceeding 4 per cent. on their said legacies.

His Honour at first objected to directing the Master to settle the maintenance, except by petition, but at last made it a part of the decree.

After the decree was pronounced, the counsel for the two daughters Margery and Frances Wynch, desired that the consideration of the interest might be reserved, until they could have an opportunity of propounding the paper above-mentioned in the Ecclesiastical Court, which his Honour thought reasonable, and directed accordingly.

In Chancery. Master of the Rolls for Lord Chancellor. Feb. 29, 1788.

TAYLOR *versus* HAYLING.

A party seeking to open an account must point out specific errors by his bill; otherwise he will not be permitted to prove them at the hearing.

The plaintiff was Manager of the Opera House, and agreed with the defendant for lighting the house every night of performance at a certain rate. A very considerable debt having been contracted by these means, and the defendant having pressed the plaintiff for payment, the plaintiff executed a bond to the defendant for a large sum of money which was the amount of the demand, but no account was regularly settled between them. This bond was afterwards paid. And now the plaintiff filed his bill,

Taylor v. *Hayling.*

charging that several errors existed in the account as made up by the defendant, but *without specifying* any such errors, and praying that an account might be taken of these dealings and transactions between them, and that the defendant might repay what he had been over-paid. The defendant in the schedule to his answer set forth the account at length.

On the hearing of the cause the plaintiff offered to shew some errors in the defendant's account, by proving some exhibits *vivâ voce*, which were receipts or vouchers tending to shew that some articles in the account had been otherwise satisfied. To this evidence the defendant's counsel objected, as there were no particular errors pointed out in the bill, and therefore it was impossible for the defendant to be prepared to meet them.

Master of the Rolls.—If by mistake or imposition a party has been overcharged in an account, he should state his case particularly by his bill, and point out the articles of the account which he complains of before he can entitle himself to any relief: but a party cannot open an account for asking for it. The plaintiff should have amended his bill, when he saw the schedule to the defendant's answer; for he must shew clearly that he has been imposed upon, before the Court will permit him to unravel an account which he has before submitted to. Now it is very possible that if these objections to the account had been specifically pointed out by the bill, the defendant might have given an answer to them, by shewing that these sums pretended to have been paid were in fact allowed for in some other articles, or accounted for in some other way. I shall therefore dismiss the bill, and the defendant is entitled to costs if he insists upon it; but I understand the plaintiff is insolvent.

ATTORNEY-GENERAL *versus* MILWARD.

In Linc. Inn-Hall, Lord Chancellor. March 3, 1788.

APPEAL FROM THE ROLLS.

If the office copies of the pleadings or proofs necessary to be read for one party, on hearing of a cause, be not signed by the proper officer, the cause must stand over on payment of 5*l.* cost for the day's attendance to the other party.

This was an information for the establishment of a charity, and the cause coming on to be heard at the Rolls in Michaelmas Term last, and the relators having occasion to read the defendant's answer, it appeared that the office copy was not signed by the proper officer; and there being therefore no evidence on the part of the relators, his Honour dismissed the information with costs.

In December 1787 the relators presented a petition to his Honour stating, that by an order of Court made in the year 1636, it was ordered, "that when and so often as any "solicitor should at the hearing of any cause in this Court "produce and offer to be read any pleadings or proofs not "duly signed by the proper officer, for so doing, such "cause should not only be put off from hearing, but the "solicitor should pay to the other party 5*l.* costs for that "day's attendance," and therefore praying that the cause might be restored to the paper upon the aforesaid terms to be heard in due course. But his Honour said, this was the subject of an appeal from the order of dismissal, and dismissed the petition with costs.

The relators now appealed to the *Lord Chancellor* on the ground of this order of Court, and prayed that the cause might be set down again to be heard, upon payment of 5*l.* costs.

His Lordship said this order of Court had certainly escaped his Honour, and that the order of dismissal must be reversed, and the cause set down to be heard, upon the terms above-mentioned.

It was ordered that the relators should pay to the defendants 5l. for the costs of the day, and also the costs of the application in December, when taxed; and further that the relators might be at liberty to apply to set down the

Attorney-General v. *Milward.*

cause again to be heard; and the sum of 10*l.* deposited by the relators with the Registrar on the setting down the said appeal to be heard should be paid back to the relators.—*Reg. Lib. A.* 1787, *fol.* 289.

In Linc. Inn-Hall, Lord Chancellor. March 3, 1788.

WARD *versus* LORD VISCOUNT DUDLEY.

For Case and Arguments, see 2 *Brown. Chan. Rep.* 316.

Lord Chancellor.—I confess this sems to me to be a very clear case. The clause by which these two sums of 5000*l.* are given, "subjects and charges all the residue of his real estate with the payment of the said sum of 5000*l.* and of the further sum of 5000*l.* to the plaintiff, to make up his portion in the whole the sum of 10,000*l.*" This is a charge in its nature and constitution a *real* charge; the question then is, whether any other parts of the will take this bounty up *de novo*, or direct it to be raised or applied in any other manner, than as is directed by the clause I have just mentioned, or make these sums payable out of the personal estate in the first instance. To make this out, resort is had to a clause in a distant part of the will, by which the "testator charges all the residue of his real estate with payment of his debts, legacies, and sums of money directed to be paid by his will in aid of his personal estate, which he directs to be first applied for that purpose." This is a general sweeping clause, which must refer to charges which *in their nature and constitution would not fall* on the real estate without an express provision for it; and then the argument is, that when the testator is providing a *real* fund as auxiliary to the personal fund for payment of what would not fall *naturally* on the *real* fund, he is making this provision for a charge which in its constitution is a charge on the real fund. The main argument is rested on the words "legacies and sums of money

directed to be paid by the will." I really do not know how to distinguish these expressions; they mean nothing more than legacies, but will not affect real charges. Comparing therefore all these clauses together, I think I have hardly met with a clearer proposition, and I must therefore affirm the decree.

Ward v. *Lord Viscount Dudley.*

In Linc. Inn-Hall, Lord Chancellor. March 13, 1788.

EX PARTE STRUTT.

An assignee of a bankrupt is never to be charged with interest for money retained in his hands at a higher rate than 4*l.* per cent. unless a special case is made for it.

An assignee in this case admitting that he had had in his hands a sum of about 500*l.* (part of the bankrupt's estate) from the year 1784, which ought to have been applied, and it being necessary that that money should be now paid into Court, he submitted so to do, and also to pay interest at 4 per cent. It was insisted on the other side, and principally on the authority of *Treves* v. *Townsend*, 1 *Bro. Cha. Rep.* 384, that an assignee retaining money unnecessarily in his hand, should answer 5 per cent. interest for it. But *Lord Chancellor* said he conceived an assignee was never charged with more than 4 per cent. unless a special case was made out for the purpose, which usually was that he had made a greater profit of the money to himself, and there can be no doubt but that he shall be answerable for the whole profit made by it to the estate. There was therefore one of two things to be done, either to take the interest at 4 per cent. or to have an inquiry what profit the assignee had made of the money, and abide the event of that inquiry. This had been the rule in *Treves* v *Townsend*, for there it was admitted that the assignee had mixed the money with his own, and the Court thought that as he had used it in his business, it was impossible but that he had made profit of it to the amount of 5 per cent. In the present case the sum being only 500*l.* retained from the year 1784, it was hardly worth the inquiry. And therefore let the assignee pay in the money with interest at 4 per cent.

In Linc. Inn-Hall, Lord Chancellor. March 13, 1788.

EX PARTE HARGREAVES.

A. B. and C. were in partnership, and A. and B. were also concerned as partners in a distinct house. Commissions issued against both firms. The estate of the *two* cannot claim any thing against the estate of the *three*, until the joint creditors of the three are fully satisfied.

Shakeshaft, Stirrup, and Salisbury had carried on a very extensive cotton-manufactory in the country. Shakeshaft and Stirrup were also in a distinct partnership together as linen-drapers in London. Salisbury who resided in the country was in the course of sending up goods to Shakeshaft and Stirrup, who lived in London, to be sold for the benefit of the three, and to draw in the names of the three upon the two in London. In the course of these transactions the three became indebted to the two in a very large amount, and then both the partnerships became bankrupt, and commissions issued out against each. At the time of the bankruptcies the two had effects belonging to three in their hands to the amount of 8000*l.* and the question now was, whether the assignees of the two had not a right to retain these goods, until they were satisfied in respect of the debt due from the three. The parties wished this question might be put in a way to be tried at law.

Lord Chancellor.—If you can agree upon a state of facts, which will take this out of the general rule, I shall certainly be glad to put it in a way of being tried; but otherwise I conceive the general principle to be now pretty well settled. This case is the same as if the trade in London had been carried on by only one of the partners; and therefore to prevent any confusion from numbers, take it as if the two partners carried on a joint trade, and one of them also carried on a separate trade; and then the general question is, whether in consequence of any dealings between the two partners, the one in his separate capacity can establish any demand against the partnership in prejudice of the joint creditors. As between the partners themselves, to be sure, the share of each in the joint fund must be subject to any demand of the other upon the

partnership; but I take it, that the whole joint fund, as it exists at the time of the bankruptcy, shall be applied in payment of the joint debts before any demand arising between the several partners can be attended to. This is a question which so often occurs in one shape or other, and is of so much importance, that it is high time it should be considered as settled. I have more than once had occasion to consider it maturely, and in the result I have found occasion to differ from the case of *Ex parte Hunter* in 1 *Atk.* and I think the principle should now be taken to be, that where there are several partners, one of whom advances more than the other for the use of the partnership, the money so advanced must be considered as so much more brought into the joint trade, and mixed with the other joint fund, and the creditors of the partnership will have a right to have such mixed fund applied to payment of their debts, before the proportions of the several partners in such joint fund, or the claim of the separate creditors of any of them in respect of the greater proportion of that partner, can be provided for. Then see whether you can substantially differ this case from that of one partner advancing money for the use of the partnership; if not, to be sure the effects in the hands of the two are part of the joint estate of the three, and there is no reason why the joint creditors of the three should not have the benefit of them.

Ex parte Hargreaves.

The next morning, at the instance of the assignees of the two, it was referred to the Master to inquire and state the circumstances under which the debt from the three to the two arose.

N. B. In former stages of these bankruptcies, as well as in the present, the *Lord Chancellor* said that ultimately only one commission ought to proceed, and the other must be got rid of; but in the meantime it would be proper to see which would best answer the convenience of the case.

KILLET *versus* FORD.

ON FURTHER DIRECTIONS.

In Linc. Inn-Hall, April 2, 1788. Lord Chancellor.

Testator charged his *real* estate with 1000*l. to be applied as the residue of his personal estate was therein after directed.* He then gave the residue of his personal estate *after his debts, legacies, and funeral expenses were paid,* to certain trustees for the benefit of his relations in manner therein mentioned. The personal estate was deficient for payment of his *debts.* The 1000*l.* is payable to the *trustees* for the relations without being subject to the claims of the *creditors.*

Robert Mitchell Dr. in physic, by his will dated the 8th January 1766, confirmed to his wife Mary certain premises in the county of Norfolk to hold to his said wife for life, the same being so settled, or agreed to be settled on her by him before his intermarriage with her; and after her decease, in case there should be no issue between them, he devised the same to the plaintiff William Killet and his heirs and assigns for ever, subject nevertheless, and he thereby charged the said premises with the payment of, and he willed he should pay thereout to his trustees Andrew Crosby, William Corrie, and John Dickson, the sum of 1000*l. to be by them applied as the residuum of his personal estate was therein after directed.* He then gave several legacies, and, amongst the rest, he gave to David Donaldson 200*l.* within six months after the decease of the said testator's wife, payable in like manner out of the said premises; and *he then gave the residue of his personal estate, after his debts, legacies, and funeral expenses were paid and discharged,* unto the said Crosby, Corrie, and Dickson in trust to pay the same to such of his the said testator's relations in such parts and proportions as they the said Crosby, Corrie, and Dickson, and the survivors and survivor of them, his executors and administrators, should think most deserving thereof.

By a codicil the said testator revoked the said legacy of 200*l.* to the said David Donaldson, and thereby directed the plaintiff to pay 200*l.* unto the said Crosby, Corrie, and Dixon, within six months after his wife's decease, out of the said premises devised to the said plaintiff and his heirs, to apply the same for the benefit of the said David Donaldson and his wife and children in manner therein mentioned.

The testator died on 19th September, 1771, without issue,

and Mary his widow died on 13th January, 1780, and thereupon the plaintiff entered upon the premises devised to him as aforesaid. He then filed his bill against Ford and Shawe, the surviving executors, and against the trustees named in the said will, and also against Donaldson and his wife, praying that the said premises, and he the said plaintiff, might be discharged from payment of the said several sums charged thereon, and that an account might be taken of what was due for principal and interest of the said two sums of 1000*l.* and 200*l.* and that the plaintiff might be at liberty to pay the amount thereof into the Bank, in the name of the *Accountant General*, the said 1000*l.* and interest, to be placed to the credit of that charge, and to be paid out either to the defendants Crosbie and Dickson, the surviving trustees for the said testator's relations, as directed by the said will, or to the defendants Ford and Shawe, the surviving executors of the testator, as assets for payment of debts, as the Court should think the same applicable, and that the said sum of 200*l.* might be placed to the account of the trust for the Donaldsons in manner therein mentioned.

The executors, by their answer, stated the personal estate to have been very small, and that the whole thereof had been applied towards payment of debts, but that a considerable sum of money still remained due to the several creditors of the said testator, and they therefore insisted that they had a right to intercept and stop in transitu the said legacy of 1000*l.* for the benefit of the creditors of the said testator, the same being directed by the will of the said testator *to be applied as the residue of his personal estate*, and that it was the intention of the said testator that the said sum of 1000*l.* should be considered as part of his personal estate, and ought to be applied in the first place in payment and satisfaction of his just debts and such legacies as were paid out of his personal estate; and that therefore so much of the said sum of 1000*l.* as might be necessary for the purposes aforesaid should be paid to the executors of the said testator to make good such deficiency.

This cause came on to be heard before the *Lord Chan-*

Killet v. *Ford.*

cellor on the 22d November 1785, when his Lordship directed an *account of the personal estate* of the testator, and of his *debts and funeral expenses*, and the personal estate to be applied in payment of his debts and funeral expenses in a course of administration; and the plaintiff submitting to pay the two sums of 1000*l.* and 200*l.* and interest, the Master was to compute interest thereon, and the plaintiff was to pay the said two sums and interest into the Bank, with the privity of the *Accountant General*, to the credit of the cause subject to further order; and the costs of all parties to be taxed, and his Lordship reserved further directions.

The Master made his report, dated 8th February, 1788, whereby he certified that the debts remaining due after application of the personal estate amounted to 309*l.* 4*s.* 3*d.* and the costs of the several parties amounted, in the whole, to 128*l.* 6*s.* 1*d.*

Stainsby for the executors mentioned the cases of *Lassels* v. *Lord Cornwallis*, 2 *Vern.* 465, and *Bainton* v. *Ward*, 2 *Atk.* 172, to shew that the executors were entitled to stop this money for the benefit of creditors.

But *Lord Chancellor* said those were cases of the execution of powers, which, when first decided, seemed to determine a point of some nicety. However, as they stood, they must be followed in similar cases; but here is no power reserved or given, but the charge is made originally by the will on the testator's own estate for a particular purpose, which never can be made assets without saying, that in every case where a testator makes any sort of charge on his real estate, the same rule must hold, which certainly has not yet obtained, and his Lordship was therefore of opinion that the 1000*l.* and 200*l.* must be applied according to the respective bequests without being liable to the claim of the creditors: and as to the costs, that they must be paid out of the plaintiff's estate, he having filed the bill for the sake of dismembering it.

To this it was objected, that there could be no reason for making the plaintiff pay the costs of so much of the suit as

arose from taking the accounts of the personal estate, which he had purposely avoided praying by his bill.

Hobbs v. Hull.

But *Lord Chancellor* said that was error in the former decree perhaps—and, indeed, he did not see how the Court came to direct those accounts in this suit. However, as that decree stood, the plaintiff's estate must bear the burthen of the costs.

In Linc. Inn-Hall. Master of Rolls for Lord Chancellor. April 10, 1788.

HOBBS *versus* HULL.

A husband having lived in a state of adultery, a separation took place between him and his wife, and upon that occasion the husband settled real estates to the amount of 300*l.* per ann. on the wife for her separate maintenance, and on the children of the marriage. Under these circumstances the settlement is *not* fraudulent as against creditors under the stat. of 13 *Eliz.*

Mr. Hull being married, and being indebted to the plaintiffs on judgments and otherwise, a separation took place between Mr. and Mrs. Hull; upon which occasion Mr. Hull made a settlement of part of his real estates to the amount of 300*l.* per annum on Mrs. Hull for her separate maintenance and upon the children of the marriage. The present bill was filed against Mrs. Hull, the children, the trustees in the settlement, and the husband, to set aside that settlement as fraudulent against the plaintiffs, the creditors of Mr. Hull, under the stat. of 13 *Eliz.* he being indebted at the time of making the settlement, and the same being (as the plaintiffs insisted) voluntary. The defence was, (and which was fully proved in the cause) that Mr. Hull had, before the time of the separation, lived in a state of adultery, which the defendants contended entitled the wife to a divorce in the Spiritual Court, a *mensâ et thoro*, and to an allowance in consequence of that divorce; and that this provision made by the settlement was only in lieu of the remedy which would be obtained by such proceeding.

Selwyn and *Johnson* for the plaintiffs, to shew that this was a settlement fraudulent against creditors mentioned the case of *Fitzer* v. *Fitzer*, 2 *Atk.* 511; and cited also in 2 *Vez.* 17. and *Taylor* v. *Jones*, 2 *Atk.* 600.

Master of the Rolls.—Courts of Equity have most cer-

Hobbs v. *Hull.*

tainly been in the habit of exercising a concurrent jurisdiction with the Courts of Law on the statutes of *Elizabeth* respecting fraudulent conveyances; but whenever they have found a case of great hardship they have generally left the creditor to his remedy at law. If, therefore, I were of opinion that this deed was a fraudulent one within the reach of that statute, I should be extremely inclined to leave the plaintiffs to get relief by ejectments on their elegits, or as they could, at law; and, indeed, what I shall now do will leave that still open to them, if they think proper so to proceed.—Lord *Hardwicke's* decision in *Fitzer* v. *Fitzer* certainly would and ought to have great weight with me, if I conceived it in point to this case; but I consider that case as having *decided* no more than this, that the husband and wife shall not be permitted, by colluding together, to disappoint the security of fair creditors. But this case is a very different one. Lord *Hardwicke*, indeed, in *Fitzer* v. *Fitzer*, alluded to a case which bore more resemblance to the present, but that he said he would not then determine. However, I am now bound to decide the question, whether the husband, having behaved so ill as to entitle the wife to obtain a divorce in the Spiritual Court a *mensâ et thoro*, and to have a proper allowance from him, if the wife, instead of strictly prosecuting that right, meets the husband in the threshold, and says she will accept the maintenance proposed by him without litigation, whether this can be said to be such a voluntary act as to be fraudulent against creditors. Surely this settlement can never be said to be without consideration; a husband and wife may certainly, in particular situations, treat together effectually, if they treat upon fair and reasonable terms. When the wife in this case agrees to accept this settlement instead of resorting to the enforcing her rights in the Ecclesiastical Court, surely she is giving up something for it. I am therefore very clearly of opinion, that this is not one of those agreements which the statute of Elizabeth meant to prevent. I do not go upon any motives of compassion, when I decree, as I am now about to do, nor upon the conduct of the

parties, but upon the rights in law which I take to exist between them. And I shall dismiss this bill with costs as to all parties but the husband, and as to him without costs.

Hobbs v. *Hull.*

N. B. There were other grounds of defence made by the answer, and which were in proof in the cause, but his Honour did not go into them, but rested his opinion on the circumstances abovementioned.

THOMPSON *versus* NELSON.

In Linc. Inn-Hall. Master of the Rolls for Lord Chancellor, April 10, 1788.

A widow will not be barred of her dower by a provision made by will, unless there be a clear indication of the testator's intention, or unless some other part of the disposition of his property would be defeated by the widow's taking both. The testator's having given *all his real* and personal estate on trust in the first place to pay such provision to the wife, is not of itself a sufficient indication of such intention.

The testator in this cause "gave and devised all and singular his real estates whatever, and all his goods, chattels, and personal estate, to trustees upon trust, in the first place to pay to his wife the sum of 480*l.* and after payment thereof to pay and apply the residue amongst his three children."

The question was whether this bequest of 480*l.* being made payable out of *all the* testator's real estates, should in this Court be a bar of dower.

The case was but little argued, but his Honour said he had a general remembrance of the cases, and though the older ones laid great stress on the *whole* real estate being disposed of by the testator, yet the inclination of the later cases was not so strong against the widow; they expected some clearer indication of the testator's intention to exclude her from her right of dower, or that it should appear that if the widow took both dower and the provision under the will, some other part of the testator's disposition of his property would be defeated; and his Honour was therefore of opinion that in this case the widow was entitled to the 480*l.* and also to her dower.

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